

**THE DOCTRINE OF *SWART GEVAAR* TO THE DOCTRINE OF  
COMMON PURPOSE: A CONSTITUTIONAL AND PRINCIPLED  
CHALLENGE TO PARTICIPATION IN A CRIME**

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Y DAVIDSON

*To all those convicted under the doctrine of common purpose*

*A luta continua*

## ABSTRACT

*Swart gevaar* was a term used during apartheid to refer to the perceived security threat of the majority black African population to the white South African government and the white minority population. The Native Territories Penal Code, transported from English law, assimilated the doctrine of common purpose into South African law. During apartheid, the doctrine of common purpose served as one of many governmental tools to criminalise the black population and curtail the *swart gevaar*. The development of the doctrine largely occurred during the apartheid-era, whereby the white-ruled judiciary continuously sacrificed legal principles to ensure that the doctrine achieved its' crime control objective. The doctrine was expanded beyond its original scope in the Native Territories Penal Code to encompass two distinct forms of common purpose, namely: common purpose by prior agreement, whether by express or implied mandate; and common purpose in its active association form.

In the 2003 case of *Thebus and Another v The State*, the Constitutional Court declared the doctrine of common purpose; in its active association form, constitutional. The Constitutional Court rejected the appellants' argument that the doctrine infringes an accused's constitutionally protected rights to dignity, freedom and security of persons, and a fair trial including the right to be presumed innocent. The Constitutional Court's finding came as a surprise, as it ignored worldwide condemnation of the doctrine throughout the apartheid regime and Constitutional democratic era. This paper challenges the Constitutional Court's finding and critically examines the doctrine of common purpose in the context of constitutional jurisprudence, general principles of criminal law, and policy considerations.

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## PREFACE

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### i. BACKGROUND

The doctrine of common purpose is comprised of two distinct forms, namely: common purpose by prior agreement and common purpose in its active association form.<sup>1</sup> The doctrine, in either form, does not require proof of a causal nexus between the participant's conduct and the ultimate unlawful consequence.<sup>2</sup> Instead, the participant's conduct must establish a prior agreement to commit a crime or an active association with the unlawful conduct of the principal perpetrator(s), coupled with the requisite fault. In this event, the conduct of the principal perpetrator(s) who caused the ultimate unlawful consequence is imputed to the other participants to the common purpose.<sup>3</sup> The participants are then regarded as co-perpetrators and may be liable to the same conviction as that of the principal perpetrator(s).<sup>4</sup>

Common purpose by prior agreement arises out of an express or implied agreement between the participants before the commission of the crime.<sup>5</sup> The agreement comprises the "group's 'mandate', which contemplates the objective of the group's criminal endeavours".<sup>6</sup> If a prior agreement is established, it is not necessary that the accused participant be present at the scene where the crime was committed.<sup>7</sup> Common purpose in its active association form covers the situation where there is an absence of proof of a prior agreement.<sup>8</sup> However, before this form of common purpose can be applied, the requirements constituting an 'active association', otherwise known as the *Mgedezi* requirements, must be individually satisfied.<sup>9</sup> The requirements, as delineated by Botha JA in *Mgedezi* and confirmed by Moseneke J in *Thebus*, are as follows:<sup>10</sup>

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<sup>1</sup> *S v Mgedezi* 1989 (1) SA 687 (A) at 705-6; J Burchell *Principles of Criminal Law* 5<sup>th</sup> Ed (2016) at 477; CR Snyman *Criminal Law* 6<sup>th</sup> Ed (2014) at 260-1.

<sup>2</sup> *Thebus v S* 2003 (6) SA 505 (CC) para 22.

<sup>3</sup> Burchell op cit (n1) at 477.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> J Grant 'Common Purpose: Thebus, Marikana and Unnecessary Evil' (2014) 30 (1) *SAJHR* 1 at 3.

<sup>7</sup> *S v Majosi* 1991 (2) SACR 532 (A); *S v Mzwempi* 2011 (2) SACR 237 (ECM) para 54; SV Hoorntje 'Criminal Law: Common Purpose' (2011) *Annual Survey of South African Law* 336 at 348; S Hoorntje 'The state of common purpose liability in South Africa' (2012) *JCCL* 180 at 184-5.

<sup>8</sup> *Thebus* supra (n2) para 19.

<sup>9</sup> Ibid para 20.

<sup>10</sup> *Mgedezi* supra (n1) at 705I-706C.

- i. Presence at the scene where the ultimate unlawful consequence was being committed;
- ii. Awareness of the ultimate unlawful consequence;
- iii. Intention to make common cause with those who were actually perpetrating the ultimate unlawful consequence;
- iv. Manifestation of a sharing of a common purpose with the perpetrators of the ultimate unlawful consequence by performing some act of association with the conduct of the others; and
- v. The requisite fault.<sup>11</sup>

Common purpose may be applied in instances where the exact identity of the member of the common purpose who caused the consequence is unknown, provided that it is established that one of the group brought about the ultimate unlawful consequence.<sup>12</sup> The prosecution would not have to prove beyond reasonable doubt that each participant committed conduct that contributed causally to the ultimate unlawful consequence. The prosecution would merely have to establish that each participant either agreed to commit a particular crime or actively associated with the commission of the crime by one of their number with the requisite fault element.<sup>13</sup>

The doctrine of common purpose was utilised to secure convictions, coupled with the imposition of the death sentence in the cases of the Sharpeville Six,<sup>14</sup> the Queenstown Six,<sup>15</sup> Solomon Mahlangu,<sup>16</sup> the Upington Fourteen,<sup>17</sup> and Nzo.<sup>18</sup> The judgments attracted significant criticism from the media and academics worldwide.<sup>19</sup> Nevertheless, in the 2003 case of *Thebus*, the Constitutional Court confirmed the constitutionality of common purpose

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<sup>11</sup> Alkema J in *Mzwempi* supra (n7) para 72 submits that the “fifth requirement of *mens rea* is a definitional element of any crime which must in any event be proved, and is not a requirement of ‘active association’”. Fault may take the form of *dolus directus*, *dolus indirectus*, *dolus eventualis* or negligence.

<sup>12</sup> Burchell op cit (n1) at 477.

<sup>13</sup> *Thebus* supra (n2) para 34.

<sup>14</sup> *S v Safatsa* 1988 (1) SA 868 (A).

<sup>15</sup> *S v Gqeba* 1989 (3) 23 SA 217 (A).

<sup>16</sup> *S v Motaung* 1990 (4) SA 485 (A).

<sup>17</sup> *S v Khumalo* 1991 (4) SA 310 (A).

<sup>18</sup> *S v Nzo* 1990 (3) SA 1 (A).

<sup>19</sup> MA Rabie ‘The Doctrine of Common Purpose in Criminal Law’ (1971) 88 *SALJ* 227; E Cameron ‘Inferential reasoning and extenuation in the case of the Sharpeville Six’ (1988) 2 *SACJ* 243; VVW Duba ‘What was wrong with the Sharpeville Six decision?’ (1990) 2 *SACJ* 180; DS Koyana *The Influence of The Transkei Penal Code on South African Criminal Law* (1992) 20-44 (published doctoral thesis); MC Mare ‘The Doctrine of Common Purpose in South African Law’ in JJ Joubert *Essays in honour of S.A Strauss* (1995) 113-33; P Parker ‘South Africa and the Common Purpose Rule in Crowd Murders’ (1996) 40 *Journal of African Law* 78; E Cameron ‘When Judges Fail Justice’ (2004) 121 *SALJ* 580; M Reddi ‘The Doctrine of Common Purpose Receives the Stamp of Approval’ (2005) 122 *SALJ* 59; U Kistner ‘Common Purpose: The Crowd and the Public’ (2015) 26 *Law and Critique* 27; Burchell op cit (n1) at 475-505.

in its active association form. The judgment received little criticism, until an attempt was later made to apply the doctrine to the events that unfolded in 2012, where 36 miners were killed by the South African Police Service in a labour dispute at Lonmin's Marikana mine.<sup>20</sup>

Burchell levels the foremost criticism against the doctrine.<sup>21</sup> His arguments set up a basis for a critique and require more in-depth analysis. Upon further research, it became evident that academics had failed to provide a critical, holistic critique of common purpose, grounded in constitutional jurisprudence, criminal law principles, and policy considerations.

## **ii. RESEARCH OBJECTIVE**

This thesis challenges the Constitutional Court's finding in *Thebus* and critically examines the doctrine of common purpose in the context of constitutional jurisprudence, general principles of criminal law, and policy considerations.

## **iii. OUTLINE**

This thesis is divided into three chapters. The first chapter provides a digest of the development of common purpose in South Africa. The doctrine is traced from its origin in the Native Territories Penal Code to its eventual extension to two distinct forms of common purpose, namely: common purpose by prior agreement and common purpose in its active association form.

The aim of Chapter Two is to present arguments declaring the entire doctrine unconstitutional. The chapter commences by detailing the Constitutional Court's judgment in *Thebus*, whereby common purpose in its active association was deemed constitutional. Thereafter, the rights to dignity, presumption of innocence, freedom and security of person, and equality will be scrutinised to ascertain whether the doctrine infringes these rights. This chapter undertakes a limitation analysis, premised on the court's adoption of a Kantian approach to the interpretation of rights.

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<sup>20</sup> M De Waal 'Apartheid and the Marikana murder charges: A common purpose indeed' The Daily Maverick 31 August 2012, available at <https://www.dailymaverick.co.za/article/2012-08-31-apartheid-and-the-marikana-murder-charges-a-common-purpose-indeed/#.WWYXKYiGPIU>, accessed 15 July 2016.

<sup>21</sup> Burchell op cit (n1) at 485-505.

Chapter Three articulates the relation between the principles of criminal law and the doctrine of common purpose. This chapter begins with a discussion of the doctrine's adherence to the principle of legality. Thereafter, the court's normative justification for the imputation of causation in common purpose by prior agreement and in its active association form is scrutinised. The chapter then details the problems associated with the assessment of fault in common purpose cases. It closes with an analysis of the effectiveness of the defences of mistake as to the causal sequence, and mistake of law to limit the liability under common purpose.

Chapter Four details the three schools of thought related to the reformation of the doctrine of common purpose. Each school of thought is analysed against the constitutional and principled findings of this paper. This chapter presents the writers recommendation for reforming the common purpose doctrine.

# CHAPTER 1

## A DIGEST OF THE DEVELOPMENT OF COMMON PURPOSE IN SOUTH AFRICA

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### 1.1 INTRODUCTION

A detailed historical development of the doctrine of common purpose will not be presented in this thesis, as numerous authors have provided a comprehensive historical account of the development of common purpose and its application in South Africa.<sup>1</sup> Nevertheless, to provide the necessary context, this chapter will summarise the development of common purpose in South Africa.

### 1.2 HISTORICAL DEVELOPMENT OF COMMON PURPOSE

The doctrine of common purpose, which was imported from England's Native Territories Penal Code,<sup>2</sup> afforded the apartheid government a means of controlling the perceived security threat of the majority black African population to the white South African government and the white minority population.<sup>3</sup> Section 78 of the Act provides:

If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.<sup>4</sup>

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<sup>1</sup> For a discussion of these historical accounts, see: MA Rabie 'The Doctrine of Common Purpose in Criminal Law' (1971) 88 *SALJ* 227; MC Mare 'The Doctrine of Common Purpose in South African Law' in JJ Joubert *Essays in honour of S.A Strauss* (1995) 113-33; P Parker 'South Africa and the Common Purpose Rule in Crowd Murders (1996) 40 *Journal of African Law* 78; M Reddi 'The Doctrine of Common Purpose Receives the Stamp of Approval' (2005) 122 *SALJ* 59; U Kistner 'Common Purpose: The Crowd and the Public' (2015) 26 *Law and Critique* 27; CR Snyman *Criminal Law* 6<sup>th</sup> Ed (2015) at 252-265; J Burchell *Principles of Criminal Law* 5<sup>th</sup> Ed (2016) at 475-505.

<sup>2</sup> Native Territories' Penal Code Act 24 of 1886.

<sup>3</sup> DS Koyana *The Influence of The Transkei Penal Code on South African Criminal Law* (1992) 20-44 (published doctoral thesis, University of South Africa).

<sup>4</sup> Section 5(e) of the Native Territories' Penal Code expands on s 78.

The first citation of the common purpose rule was the 1917 case of *McKenzie v Van der Merwe*,<sup>5</sup> where the Appellate Division (hereinafter AD) applied the rule in a civil case. Chief Justice Innes held that the common purpose rule is based upon implied mandate, meaning a mandate that is derived from the circumstances. Accordingly, Innes held that “the mere fact of being in a common purpose to rebel did not render the defendant liable for the acts of every other rebel unless the defendant had instigated or authorised those acts.”<sup>6</sup>

In the 1923 case of *Garnsworthy*,<sup>7</sup> Judge Dove-Wilson applied the common purpose rule outside the scope of the Native Territories’ Penal Code. A group of miners at the Brakpan mine instigated an armed assault to shut down the operations of the mine. Seven people defending the mine were killed after surrendering, whilst one person was killed during the assault. There was no proof that any of the accused had killed any of the deceased. Nevertheless, the court found all of the accused guilty of murder on the basis of common purpose.

In *Garnsworthy*, the court did not refer to *McKenzie*, wherein the issue of mandate was emphasised. The common purpose rule was often cited, but only as an alternative form of words to the phrase “aid, abet, counsel or procure.” Accordingly, the common purpose rule was interchangeable with the principles of complicity.<sup>8</sup> Furthermore, the court ignored the issue of whether the doctrine necessitated a causal link between the accused’s act and the death of the eight miners defending the Brakpan mine. The court’s disregard of the causal requirement persisted in the majority of common purpose cases.<sup>9</sup>

In 1945, the AD heard the first crowd common purpose case, *Duma*.<sup>10</sup> The deceased, Mr Dhlative, was chased by a crowd of about 30 people and stabbed to death. Evidence at the trial court revealed that accused Nos. 1, 3 and 4, armed with sticks, were members of the attacking party. However, there was no evidence that the accused struck any blows. Nevertheless, the Natal High Court convicted accused Nos. 1, 3 and 4 of murdering Mr Dhlative. The accused then appealed on the facts to the AD. Tindall JA held:

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<sup>5</sup> *McKenzie v Van der Merwe* 1917 AD 41.

<sup>6</sup> *Ibid* at 46-47; Parker op cit (n1) at 82.

<sup>7</sup> *R v Garnsworthy* 1923 WLD 17.

<sup>8</sup> *R v Ngcobo* 1928 AD 372; *R v Mbande* 1933 AD 382; *R v Longone* 1938 AD 532; *R v Matsiwane* 1942 AD 213; Parker op cit (n1) at 82-3.

<sup>9</sup> MA Rabie op cit (n1) at 232-3; *R v Shezi* 1948 (3) SA 119 (AD); *R v Mgxwiti* 1954 (1) SA 370 (A); *R v Nsele* 1955 (2) SA 145 (AD); *R v Bergstedt* 1955 (4) SA 186 (AD); *R v Dladla* 1962 (1) SA 307 (A); *R v Macala* 1962 (3) SA 270 (A); *S v Malinga* 1963 (1) SA 692 (AD); *S v Nkombani* 1963 (4) SA 877 (AD); *S v Bradbury* 1967 (1) SA 387 (AD); *S v Williams* 1970 (2) SA 645 (AD).

<sup>10</sup> *R v Duma* 1945 AD 410; Parker op cit (n1) at 83.

Thus, though there was no previous agreement, there was concerted action among the persons with a common intention, namely, that of overtaking the deceased and beating him with sticks...<sup>11</sup> The existence of a common illegal purpose may be inferred indirectly from the facts of a case.<sup>12</sup>

Tindall JA attempted to construct a presumption of intent, whereby the means used to commit a crime would constitute sufficient evidence to convict anyone found with the same means to hand.<sup>13</sup> Tindall JA's judgment may have been a dissenting judgment, but it initiated two innovative formulations of the doctrine of common purpose.<sup>14</sup> First, he held that the mandate of the common purpose could be implied. Secondly, proof of a previous conspiracy was not required.

Tindall's second formulation entailed two scenarios. First, an individual could spontaneously become a participant to an existing common purpose devoid of participation in the previous conspiracy.<sup>15</sup> Secondly, a common purpose could exist without prior agreement, whereby a person acting with a common intent on an impulse is sufficient to constitute a common purpose.<sup>16</sup> The AD favoured the second scenario.<sup>17</sup>

Tindall's dissenting judgment in *Duma* was partly rejected in *Shezi*.<sup>18</sup> By this time, common purpose had already been extended beyond the scope of the Native Territories Penal Code. Greenberg JA's judgment in *Shezi* sought to extend the liability net even further, holding that the means by which the result is produced is irrelevant, as liability depends on whether the act falls within the mandate.<sup>19</sup> The judgment was declared incorrect by the AD in *Goosen*<sup>20</sup> only 42 years later.

The doctrine continued to be developed to cover any lacunae that curtailed crime control. Noticeably, the interpretation of the doctrine at the time failed to address a major lacuna existing in instances where the liability of an individual who joined the common purpose

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<sup>11</sup> *Duma* supra (n10) at 418.

<sup>12</sup> *Ibid* at 418.

<sup>13</sup> *Ibid* at 416-420; Parker op cit (n1) at 84.

<sup>14</sup> Parker op cit (n1) at 85-6.

<sup>15</sup> *R v Mkhize* 1946 AD 197 at 206; Parker op cit (n1) at 86.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Mkhize* supra (n16) at 205-6; *R v Ndhlangisa* 1946 AD 1101; *Shezi* supra (n9) at 128; *R v Mthembu* 1950 (1) SA 670 (AD); *Mgxwiti* supra (n9) at 382; *Bergstedt* supra (n9) at 188; *R v Motaung* 1961 (2) SA 209 (AD) at 210-11; *S v Nkomo* 1966 (1) SA 831 (AD) 833-4.

<sup>18</sup> *Shezi* supra (n9).

<sup>19</sup> *Ibid* at 128-30.

<sup>20</sup> *S v Goosen* 1988 (4) SA 491 (AD).



while the victim was alive but only after the victim had been dealt the lethal blow was unclear. In *Mgxwiti*,<sup>21</sup> an attempt was immediately made to fill this lacuna, whereby Schreiner JA revived the maligned theory of ratification.

In *Mgxwiti*, the appellant contended that he could not be guilty of murder on the doctrine of common purpose, unless he associated himself with that purpose at a time when the deceased had not yet received a fatal injury.<sup>22</sup> After interpreting the evidence, Schreiner JA noted that when the appellant reached the deceased, the deceased had already been mortally wounded. The appellant made common cause with the people responsible for the death of the deceased, but the common cause was made whilst the deceased was alive, yet after the cause of death had been committed. Schreiner JA's interpretation of the evidence did not allow for a conviction of murder. In order to convict the appellant of murder, the basis of liability under common purpose had to be extended. Accordingly, Schreiner JA sacrificed legal principles and revived the theory of ratification, holding:

I can see no objection, however, to according, in this narrow field, recognition to the principle of ratification— that whoever joins in a murderous assault upon a person must be taken to have ratified the infliction of any injuries which have already been inflicted, whether or not in the result these turn out to be fatal either individually or taken together.<sup>23</sup>

As early as 1925, Kotze J admonished the theory of ratification.<sup>24</sup> Nevertheless, Schreiner JA revived the theory of ratification due to its “practical advantages” of securing convictions.<sup>25</sup> Schreiner JA's theory of ratification was later endorsed by the majority of the Rhodesian Federal Court in *Chenjere*<sup>26</sup> and the Natal Provincial Division of the Supreme Court in *Mneke*.<sup>27</sup> The unanimous judgment in *Thomo*,<sup>28</sup> per Wessels JA, rejected the theory of ratification, holding “the rule is contrary to accepted principle and authority. Even if it were open to this court to give its approval to the rule of law referred to in *Mgxwiti*'s case, I am satisfied that no good reason exists why it should do so”.<sup>29</sup>

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<sup>21</sup> *Mgxwiti* supra (n9).

<sup>22</sup> Ibid 383A; Parker op cit (n1) at 88.

<sup>23</sup> Ibid.

<sup>24</sup> *R v Mlooi* 1925 AD 131 at 152.

<sup>25</sup> *Mgxwiti* supra (n9) at 383A-B.

<sup>26</sup> *R v Chenjere* 1960 (1) SA 473 (FC) 476E-477A and 481E-H.

<sup>27</sup> *R v Mneke* 1961 (2) SA 240 (N) 243H-244A.

<sup>28</sup> *R v Thomo* 1969 (1) SA 385 (A).

<sup>29</sup> Ibid at 399H and 400C.

In 1982, the theory of ratification received attention in *Khoza*,<sup>30</sup> whereby Corbett JA's judgment affirmed the theory's rejection. However, Botha AJA's dissenting judgment supported the theory of ratification, holding that the theory "is a pragmatic one which I consider to be soundly based on considerations of policy and practical exigency in the administration of criminal justice".<sup>31</sup> Botha AJA's approach was later followed by Thirion J in *Dlamini*,<sup>32</sup> who endorsed the need for a pragmatic approach in such cases.<sup>33</sup> The theory of ratification was finally rejected in 1990 in *Motaung*,<sup>34</sup> whereby Hoexter JA declared the element of retrospectivity alien to our principles of criminal responsibility.<sup>35</sup>

The importance of the *Khoza* judgment pertained to the dissenting judgment of Botha AJA, wherein he introduced the notion of 'active association'. Botha AJA did not apply the theory of ratification to create liability, and instead, opted for an even greater danger to legal principles. He discussed the necessity of a causal nexus, noting that in the cases of *Mgxwiti* and *Dlaldla*, criminal liability ensued despite the lack of proof that the accused contributed causally to the death of the deceased.<sup>36</sup> Botha AJA held that the *actus reus* of the accused consists "not in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill."<sup>37</sup> It is sufficient to found the appellant's liability simply on his active association with accused No. 2's murderous assault on the deceased".<sup>38</sup>

Botha AJA failed to delineate the concept of association. Snyman appropriately condemned Botha AJA's judgment, reasoning that the departure from a causal nexus effectively redefined the common law crime of murder.<sup>39</sup> Furthermore, Snyman equated the concept of active association with the theory of ratification, holding that "an adoption of the former must necessarily lead to an application of the latter – something which would be completely foreign to the principles of our law".<sup>40</sup> Botha AJA's judgment in *Khoza* was the minority

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<sup>30</sup> *S v Khoza* 1982 (3) SA 1019 (A).

<sup>31</sup> *Ibid* at 1049H.

<sup>32</sup> *S v Dlamini* 1984 (3) SA 360 (N).

<sup>33</sup> *Ibid* at 367B-D.

<sup>34</sup> *S v Motaung* 1990 (4) SA 485 (A).

<sup>35</sup> *Khoza* *supra* (n31) at 521B-C.

<sup>36</sup> *Ibid* at 1052D.

<sup>37</sup> *Ibid* at 1052F-G.

<sup>38</sup> *Ibid* at 1053H.

<sup>39</sup> CR Snyman *Criminal Law* 1<sup>st</sup> Ed (1984) at 214.

<sup>40</sup> *Ibid*.

judgment, but this formed the basis of his later judgment in *Safatsa*.<sup>41</sup>

Botha JA utilised the factual scenario of *Safatsa* to affirm his dissenting judgment in *Khoza*. The AD, per Botha JA, held that proof that the six accused contributed causally to the death of the deputy mayor was not required, instead the accused could be found guilty on their active association in the common purpose.<sup>42</sup> The concept of active association, despite its introduction six years earlier in *Khoza*, remained undefined. Nevertheless, Botha JA justified common purpose on the basis of “a lot of common sense and expediency”.<sup>43</sup> Furthermore, he attempted to dismiss the earlier criticism against the doctrine, asserting “what is more important is that the authors who are critical of the practice of the courts do not appear to have problems with the actual results achieved in the vast majority of cases”.<sup>44</sup>

The judgment in *Safatsa* received worldwide opprobrium. Justice Edwin Cameron later criticised the judgment, holding that it was as “an outrageous curvature of the laws of logic and fairness— a miscarriage of justice symptomatic of the extremities apartheid was inflicting on the legal system”.<sup>45</sup> *The London Times* described the six accused as “victims of legal chicanery”, concluding that “such a judicial system hardly deserves the name. It is little more than a charade designed to deter and intimidate – terror tailored to the purposes of the State”.<sup>46</sup> The criticism against the *Safatsa* judgment was chiefly due to the application of the factual matrix to the undefined concept of active association.<sup>47</sup> In an attempt to salvage South Africa’s judiciary from the global onslaught of criticism, Botha JA attempted to develop the concept of active association in *Mgedezi*.<sup>48</sup>

Botha JA infused his earlier innovation of the concept of active association with Whiting’s approach,<sup>49</sup> resulting in the birth of what is presently known as the *Mgedezi* requirements.<sup>50</sup> The *Mgedezi* requirements, coupled with their refinements in *Yelani*,<sup>51</sup> *Jama*,<sup>52</sup> and

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<sup>41</sup> *S v Safatsa* 1988 (1) SA 868 (A); Parker op cit (n1) at 96-9.

<sup>42</sup> *Safatsa* supra (n41) at 894G.

<sup>43</sup> Ibid at 899H.

<sup>44</sup> Ibid at 901A-B.

<sup>45</sup> E Cameron ‘When Judges Fail Justice’ (2004) 121 *SALJ* 580.

<sup>46</sup> *The Times*, 16 March 1988; Parker op cit (n1) at 98-9.

<sup>47</sup> E Cameron ‘Inferential reasoning and extenuation in the case of the Sharpeville Six’ (1988) 2 *SACJ* 243; VVW Duba ‘What was wrong with the Sharpeville Six decision?’ (1990) 2 *SACJ* 180.

<sup>48</sup> *S v Mgedezi* 1989 (1) SA 687 (A).

<sup>49</sup> R Whiting ‘Joining in’ (1986) 103 *SALJ* 38.

<sup>50</sup> The *Mgedezi* requirements are detailed in the preface (page 2).

<sup>51</sup> *S v Yelani* 1989 (2) SA 43 (A).

<sup>52</sup> *S v Jama* 1989 (3) SA 427 (A).

*Petersen*,<sup>53</sup> served as a limitation to the widely accrued liability under common purpose. However, the limitation bore no practical effect, as the court's application of the factual matrix to the *Mgedezi* requirements evinced the judiciary's freedom to interpret a case with hindsight directed at crime control. The submission is affirmed by the infamous case of *Nzo*,<sup>54</sup> wherein counsel for the appellants argued that the doctrine of common purpose should not be used to hold members of a large organisation, the ANC, liable for crimes committed by other members with which individual members had not associated themselves.<sup>55</sup>

Steyn JA in *Nzo* supported the contention, asserting that an "overarching common purpose to commit sabotage is insufficient to warrant liability for murder".<sup>56</sup> Nevertheless, the AD, per Hefer JA, held that "their design was to wage a localised campaign of terror and destruction; and it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed".<sup>57</sup> Furthermore, Hefer JA asserted that "there is no logical distinction between a common design relating to a particular offence and one relating to a series of offences".<sup>58</sup> Burchell submits that Hefer JA's judgment was another attempt to extend the scope of the doctrine of common purpose, as the court's application of the facts in *Nzo* did not satisfy the necessary *Mgedezi* requirements.<sup>59</sup>

The courts evinced a proclivity to sacrifice legal principles and apply the doctrine correctly where crime control was the central theme. Manifestly, on a number of occasions, the AD had to correct the trial court's application of the doctrine, as the guilt of the accused, specifically the existence of a common purpose and the requisite fault element was assessed on a generalised basis as opposed to the legally accepted norm of individually assessed guilt.<sup>60</sup> The case of *Magmoed v Janse van Rensburg*<sup>61</sup> was the first case wherein the doctrine of common purpose was applied against the State, thus marking a noteworthy exception to the State's intended purpose of an oppressive law.

In *Magmoed*, the South African Police and South African Railway Police responded to a

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<sup>53</sup> *S v Petersen* 1989 (3) SA 420 (A).

<sup>54</sup> *S v Nzo* 1990 (3) SA 1 (A).

<sup>55</sup> *Ibid* at 7E-F.

<sup>56</sup> *Ibid* at 16C.

<sup>57</sup> *Ibid* at 7I-J.

<sup>58</sup> *Ibid* at 8G-H.

<sup>59</sup> J Burchell 'S v Nzo 1990 (3) SA 1 (A) Common-Purpose Liability' (1990) 3 *SACJ* 345 at 348-9.

<sup>60</sup> Parker *op cit* (n1) at 98; *Jama supra* (n52) at 439D; *Mgedezi supra* (n48) at 703B; *S v Khumalo* 1991 (4) SA 310 (A) at 315G-H.

<sup>61</sup> *Magmoed v Janse Van Rensburg* 1993 (1) SACR 67 (A).

threat of civil unrest in the Athlone area.<sup>62</sup> Ten officers, armed with shotguns drove in a truck down Thornton Road. The officers fired a number of shots in the direction of persons gathered in groups, resulting in three persons being killed and wounding at least 15 others. The trial court acquitted all the officers of both charges.<sup>63</sup> The appellant, dissatisfied with the trial court's judgment, applied for the reservation of certain questions of law for the consideration of the AD.<sup>64</sup> The application was rejected by the trial court. The appellant then applied directly to the AD.<sup>65</sup>

The AD rejected the application, reasoning that the trial court was correct in holding that the appellant's question, regarding whether the trial court was correct in concluding that no common purpose in both forms existed, was an attempt to frame a matter of fact as a matter of law. However, the AD, per Corbett CJ, intimated that "there are strong indications of a common purpose on the part of the Accused to act illegally".<sup>66</sup> The question then arises as to the reason why the trial court found that no such common purpose existed. The trial court concluded that despite the strong evidence in favor of the existence of a common purpose, there was no common purpose by prior agreement.<sup>67</sup>

However, the trial court, per Williamson J, did admit that "it is quite correct that in my judgment I did not specifically and in so many words deal with whether or not a spontaneous on the spur of the moment association to commit illegal acts was formed. Perhaps I should have".<sup>68</sup> It is submitted that had the trial court applied the factual matrix to common purpose by active association, the accused policemen would have been found guilty of murder. The submission is supported by the AD's interpretation of the admitted evidence.<sup>69</sup>

The development of common purpose thrived under the apartheid-ruled judiciary. Legal principles were ungrudgingly sacrificed to protect White South Africa regarding the *Swart Gevaar*. The rise of the African National Congress and the introduction of a constitution that sought to guarantee everyone a number of rights non-existent during apartheid, suggested the demise of laws that were inherently utilised to criminalise black people. This was not to be.

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<sup>62</sup> Ibid at 2.

<sup>63</sup> Ibid at 4.

<sup>64</sup> Ibid at 4.

<sup>65</sup> Ibid at 5, 7-8.

<sup>66</sup> Ibid at 17.

<sup>67</sup> *Magmoed v Janse Van Rensburg* 1990 (2) SACR 476 (C) at 479A; *Magmoed* (A) supra (n62) at 21-2.

<sup>68</sup> *Magmoed* (C) supra (n67).

<sup>69</sup> *Magmoed* (A) supra (n61) at 20.

The Constitutional dispensation marked a vital change to South Africa's legal and civil culture. The Bill of Rights guaranteed a number of important rights to everyone, thus providing a laudable bulwark against the oppressive laws of the apartheid regime. The survival of the doctrine of common purpose, grounded as an oppressive law applied by the apartheid government, seemed implausible against an individual's constitutionally guaranteed rights. Burchell submitted that "the common-purpose rule in South Africa might not survive such a constitutional challenge", as an accused's right to equality and presumption of innocence is unjustifiably limited.<sup>70</sup>

The extension of the doctrine and its controversial effects continued after the promulgation of the final Constitution. The judgment of the Supreme Court of Appeal (hereinafter SCA) in *Khambule*<sup>71</sup> was another instance where the scope of the doctrine of common purpose was extended in an effort to control crime. The court extended common purpose to apply to charges of possession of a firearm, holding that it was sufficient if the participants associated themselves with the possession of the firearms.<sup>72</sup> The judgment in *Khambule* survived for two years, until the SCA in *Mbuli*<sup>73</sup> held that a "contravention does not arise from an application of the principles applicable to common purpose, but rather from an application of ordinary principles relating to joint possession."<sup>74</sup>

In the 2003 case of *Thebus*,<sup>75</sup> the constitutionality of common purpose was finally scrutinised. The Constitutional Court (hereinafter CC) assessed the appellants' claim as to whether the SCA failed to comply with its duty in terms of s 39(2) of the Constitution to develop and apply the common law doctrine of common purpose so as to bring it in line with the constitutional rights to dignity, freedom and security of the person and the right to be presumed innocent. The CC rejected the appellants' arguments, and constitutionally endorsed common purpose in its active association form.<sup>76</sup> Moseneke J expressed the doctrine as follows:

Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their

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<sup>70</sup> J Burchell 'Joint enterprise and common purpose: perspectives in English and South African criminal law' (1997) 10 *SACJ* 120 at 139-40.

<sup>71</sup> *S v Khambule* 2001 (1) SACR 501 (SCA).

<sup>72</sup> *Ibid* at 503E-F.

<sup>73</sup> *S v Mbuli* 2003 (1) SACR 97 (SCA).

<sup>74</sup> *Ibid* para 71I-J; *S v Molimi* 2006 (2) SACR 8 (SCA).

<sup>75</sup> *Thebus v S* 2003 (6) SA 505 (CC).

<sup>76</sup> A detailed breakdown of the CC's judgment in *Thebus* is presented in chapter 2.2.

number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.<sup>77</sup>

The most controversial effect of common purpose, which was entirely ignored by the CC in *Thebus* nearly 10 years earlier, came to light in the aftermath of the notorious Marikana Massacre.

On 30 August 2012, the National Prosecuting Authority (NPA) charged 270 miners in the Ga-Rankuwa Magistrate’s Court with the murder of 34 of their mining comrades, who were shot and killed by police at Lonmin’s platinum mine in Marikana.<sup>78</sup> Additionally, the 270 miners had been charged with attempted murder for the injuries inflicted by the police on 78 miners.<sup>79</sup> The decision to charge the miners was later withdrawn and suspended.<sup>80</sup> The NPA’s decision to prosecute the miners was met with fervent condemnation from legal academics extending to society at large.<sup>81</sup> Devenish asserts that the decision to prosecute is “indeed an unprecedented, irrational and distorted application of the doctrine and will undoubtedly taint the NPA with notoriety internationally. Even during the long and very painful apartheid era involving serious civil commotion spanning more than four decades, was such a farcical criminal ruse ever devised”.<sup>82</sup> Similarly, De Vos submits that the decision is “bizarre and shocking and represents a flagrant abuse of the criminal justice system, most probably in an effort to protect the police and/or politicians”.<sup>83</sup> However, the NPA’s decision to charge the 270 miners, although unprecedented, irrational, bizarre and shocking, is consistent with the objective of the doctrine of common purpose. The doctrine infringes a number of

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<sup>77</sup> *Thebus* supra (n75) para 18, citing J Burchell & J Milton *Principles of Criminal Law* 2<sup>nd</sup> Ed (1997) at 393.

<sup>78</sup> M De Waal ‘Apartheid and the Marikana murder charges: A common purpose indeed’ *The Daily Maverick* 31 August 2012, available at <https://www.dailymaverick.co.za/article/2012-08-31-apartheid-and-the-marikana-murder-charges-a-common-purpose-indeed/#.WWYXKYiGPIU>, accessed 15 July 2016.

<sup>79</sup> *Ibid.*

<sup>80</sup> D Subramnay & N Bauer ‘Murder charges against Marikana miners withdrawn’ *Mail & Guardian* 2 Sep 2012, available at <https://mg.co.za/article/2012-09-02-murder-charges-against-marikana-miners-withdrawn>, accessed 15 July 2016.

<sup>81</sup> City Press ‘Zuma told: Released miners by Sunday’ 31 August 2012, available at <http://www.news24.com/SouthAfrica/News/Zuma-told-Release-miners-by-Sunday-20120831-2>, accessed 15 July 2016; M De Waal ‘Marikana: NPA drops “common purpose” charges, but critical questions remain’ *Daily Maverick* 3 September 2012, available at <https://www.dailymaverick.co.za/article/2012-09-03-marikana-mpa-drops-common-purpose-charges-but-critical-questions-remain>, accessed 15 July 2016.

<sup>82</sup> GE Devenish ‘Folly of Common Purpose’ *Daily News* 5 September 2012, available at <http://www.iol.co.za/dailynews/opinion/folly-of-common-purpose-1376252>, accessed 12 July 2016).

<sup>83</sup> P De Vos ‘Marikana: No common purpose to commit suicide’ *Constitutionally Speaking* 30 August 2012, available at <http://constitutionallyspeaking.co.za/marikana-no-common-purpose-to-commit-suicide/>, accessed 12 July 2016.

constitutional rights,<sup>84</sup> and erodes established principles of criminal law,<sup>85</sup> thus the potential for abuse exists, as clearly demonstrated in the Marikana situation.

### 1.3 CONCLUSION

The doctrine of common purpose has evolved significantly in South Africa since its inception from English law. Common purpose has been extended beyond the scope of the Native Territories Penal Code, recognising an implied mandate as sufficient to found a common purpose. A further extension pertained to the new form of common purpose, active association, which the CC constitutionally endorsed. The ensuing chapter begins by detailing the CC's judgment in *Thebus*. Thereafter, arguments challenging the constitutionality of the doctrine of common purpose in South Africa will be presented.

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<sup>84</sup> The constitutionality of the doctrine of common purpose is challenged in chapter 2.

<sup>85</sup> The doctrine's adherence to a number of criminal law principles is assessed in chapter 3.



## CHAPTER 2

### A CONSTITUTIONAL CHALLENGE OF THE DOCTRINE OF COMMON PURPOSE IN SOUTH AFRICAN LAW

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#### 2.1 INTRODUCTION

Sometimes people hold a core belief that is very strong. When they are presented with evidence that works against that belief, the new evidence cannot be accepted. It would create a feeling that is extremely uncomfortable, called cognitive dissonance. And because it is so important to protect the core belief, they will rationalize, ignore and even deny anything that doesn't fit in with the core belief.<sup>1</sup>

The Constitutional Court's endorsement of the doctrine of common purpose in *Thebus and Another v The State*<sup>2</sup> has espoused a guarantee of an accused's constitutionally protected rights to dignity, freedom and security of persons, and a fair trial including the right to be presumed innocent. This chapter begins by elucidating the judgment in *Thebus*, whereby the Constitutional Court (hereinafter CC) had to determine whether the doctrine had to be developed and applied so as to bring it in line with the aforementioned constitutional rights. Thereafter, heeding Moseneke J's expression that "the appellants stopped short of asserting that the doctrine of common purpose is unconstitutional in its entirety",<sup>3</sup> arguments declaring the entire doctrine unconstitutional will be presented. This chapter presents arguments detailing the potential infringements of an accused's right to dignity, presumption of innocence, freedom and security of person, and equality. A limitation analysis is undertaken, premised on the court's adoption of a Kantian interpretive approach to the limitation of rights.

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<sup>1</sup> Frantz Fanon *Black Skin, White Masks* (1952) at 23.

<sup>2</sup> *Thebus v S* 2003 (6) SA 505 (CC).

<sup>3</sup> *Ibid* para 23.

## 2.2 THEBUS AND ANOTHER V THE STATE: A SUMMARY

### 2.2.1 *The facts*

In 1998, residents of Ocean View formed a group, which included Thebus (First Appellant) and Adams (Second Appellant), to protest against drug dealers in the area.<sup>4</sup> The protesting group drove through Ocean View in a motorcade. As the motorcade approached the house of Cronje, a drug dealer in the area, Cronje fired a number of gunshots on the protesting group. The protesting group retaliated with gunfire. As a result, a seven-year-old girl was killed in the cross-fire. Furthermore, two males were wounded in the cross-fire.<sup>5</sup> Both appellants were arrested on suspicion of having been part of the group.

In 2000, the appellants were brought to trial.<sup>6</sup> Kiel, a state witness, testified that he saw the first appellant near a vehicle holding a pick-axe handle.<sup>7</sup> Furthermore, Kiel testified to seeing the second appellant holding an apparently unused firearm and also retrieving spent cartridges of other protestors.<sup>8</sup> The Cape High Court accepted the State's evidence that proved the appellants' presence at the scene of the shooting. Accordingly, the trial court rejected the appellants' alibi defences, which were not disclosed before the trial. Mitchell AJ applied the doctrine of common purpose to convict the appellants on one count of murder and two counts of attempted murder.<sup>9</sup> The appellants were granted leave to appeal against their convictions. In 2002, the majority of the Supreme Court of Appeal (hereinafter SCA) (per Lewis AJA and Olivier JA concurring) upheld the trial court's findings and dismissed the appellants' appeal.<sup>10</sup> Subsequently, the appellants made an application for special leave to appeal to the CC against the judgment and order of the SCA.

### 2.2.2 *The legal issues*

The CC granted leave to appeal. The appellants raised two issues: (1) whether the SCA failed to comply with its duty in terms of s 39(2) of the Constitution to develop and apply the common law doctrine of common purpose so as to bring it in line with the constitutional

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<sup>4</sup> *Thebus* supra (n2) para 2.

<sup>5</sup> *S v Abduraghman Thebus* (WCC) unreported case no SS77/2000 of 14 September 2000; *Thebus* (CC) supra (n2) para 2.

<sup>6</sup> *Abduraghman Thebus* (WCC) supra (n5).

<sup>7</sup> *Thebus* supra (n2) para 5.

<sup>8</sup> *Ibid* para 6.

<sup>9</sup> *Ibid* para 6.

<sup>10</sup> *S v Thebus* 2002 (2) SACR 566 (SCA); *Thebus* (CC) supra (n2) para 15.

rights to dignity, freedom and security of the person and the right to be presumed innocent; and (2) whether the SCA erred in drawing a negative inference from the first appellant's failure to disclose an alibi defence prior to trial, in violation of his constitutional right to silence.<sup>11</sup>

### **2.2.3 The Constitutional Court's judgment**

The CC, per Moseneke J, defined the doctrine of common purpose as "a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime".<sup>12</sup> Moseneke J relied on Burchell's<sup>13</sup> and Snyman's<sup>14</sup> articulations on the definition of common purpose.<sup>15</sup> The CC affirmed the judgment in *Magmoed v Janse van Rensburg*, whereby the Appellate Division articulated that a "common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement".<sup>16</sup> The CC held that the present matter was devoid of any prior agreement.<sup>17</sup> Accordingly, the CC clarified the trial courts reliance on the judgment in *Mgedezi*,<sup>18</sup> wherein the requirements for common purpose by active association were expounded.<sup>19</sup>

The appellants' argued that the judgment in *Mgedezi*, specifically the requirements of active association, should have been developed in accordance with s 39(2) of the Constitution, and if this had been done, the appellants would have been entitled to an acquittal.<sup>20</sup> The appellants contended that the High Court and the SCA failed to develop, apply and elucidate the following requirements:

- i. there must be a causal connection between the actions of the appellants and the crime for which they were convicted;

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<sup>11</sup> The second issue is not of academic importance for this dissertation.

<sup>12</sup> *Thebus* supra (n2) para 18.

<sup>13</sup> J Burchell and J Milton *Principles of Criminal Law* 2<sup>nd</sup> ed (1997) at 393 "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."

<sup>14</sup> C Snyman *Criminal Law* 4<sup>th</sup> ed (2008) at 261 "the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others."

<sup>15</sup> *Thebus* supra (n2) para 18.

<sup>16</sup> *Magmoed v Janse van Rensburg* 1993 (1) SA 777 (A) at 810G.

<sup>17</sup> *Thebus* supra (n2) para 19.

<sup>18</sup> *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706B.

<sup>19</sup> *Thebus* supra (n2) para 20. The *Mgedezi* requirements are detailed in the preface (page 2).

<sup>20</sup> *Ibid*.

- ii. the appellants must have actively associated themselves with the unlawful conduct of those who actually committed the crime; and
- iii. the appellants must have had the subjective foresight that others in the group would commit the crimes.<sup>21</sup>

The CC noted that the appellants failed to challenge the constitutionality of the doctrine of common purpose in its entirety.<sup>22</sup>

The CC relied on the two-stage enquiry expounded in *Carmichele v Minister of Safety and Security* to interrogate the appellant's arguments.<sup>23</sup> Section 39(2) of the Constitution requires that when a court develops the common law it must promote the spirit, purpose and objects of the Bill of Rights. Moseneke J explicated two instances where the need to develop the common law under s 39(2) could arise. The first instance is where a rule of the common law is inconsistent with a constitutional provision, thus compelling an adaptation of the common law to resolve the inconsistency.<sup>24</sup> A constitutional challenge in this instance requires the two-part test for constitutional validity delineated by Kriegler J in *In Re S v Walters*.<sup>25</sup> The second instance is where a rule of the common law is not inconsistent with a specific constitutional provision but falls short of its spirit, purpose and objects, thus requiring adaptation so that it grows in harmony with the "objective normative value system" found in the Constitution.<sup>26</sup> In view of the above, the CC assessed the appellants' arguments.

The appellants urged the CC to develop the doctrine by requiring proof that the conduct of the participant to the common purpose factually and legally caused or contributed to the ultimate unlawful consequence.<sup>27</sup> However, the CC proclaimed that the *Mgedezi* principles were not directly challenged by the appellants.<sup>28</sup> The CC asserted the rule that a causal connection between the conduct of each participant in the crime and the unlawful consequence caused by one or more in the group is not a requirement to establish criminal

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<sup>21</sup> Ibid para 23.

<sup>22</sup> In *Thebus*, the Constitutionality of common purpose in its active association form was assessed. Only two of the *Mgedezi* requirements were constitutionally scrutinised, thus ignoring a number of other arguments against the doctrine. Furthermore, the constitutionality of common purpose by prior agreement was not assessed.

<sup>23</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC). The first enquiry is whether, given the objectives of section 39(2) of the Constitution, the existing common law should be developed beyond existing precedent. An affirmative outcome in the first enquiry leads to the second stage, whereby an enquiry into the manner in which the development should occur and whether the CC or SCA should embark on that exercise is determined; *Thebus* supra (n2) para 26.

<sup>24</sup> *Thebus* supra (n2) para 28.

<sup>25</sup> *Thebus* supra (n2) para 29; *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 26-7.

<sup>26</sup> *Thebus* supra (n2) para 31.

<sup>27</sup> Ibid para 33.

<sup>28</sup> Ibid para 22.

liability.<sup>29</sup> Furthermore, the CC cited identical causal nexus rules in many other common law jurisdictions, such as England, Canada, Australia, Scotland and America.<sup>30</sup>

The CC confirmed that an accused participant would be guilty of the offence if the accused had the required intention in respect of the unlawful consequence and actively associated with the conduct of the perpetrators in the group that caused the offence.<sup>31</sup> In effect, the doctrine of common purpose dispenses with the prerequisite for a causal connection between the accused's conduct and the unlawful consequence, which is ordinarily a prerequisite for criminal liability in a consequence crime.<sup>32</sup> The CC justified dispensing with a causal nexus on the basis of society's interest in crime control thus:

The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social "need to control crime committed in the course of joint enterprises". The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.<sup>33</sup>

The appellants made four submissions in support of their legal issue. First, the appellants submitted that the doctrine of common purpose violated their dignity, as they were deprived of their individuality by treating them "in a general manner as nameless, faceless parts of a group".<sup>34</sup> Furthermore, the appellants argued that an accused charged with murder, as opposed to an alternative charge or competent verdict, severely taints an individual's dignity.<sup>35</sup> Moseneke J disagreed with the appellants reasoning, holding that "it is fallacious to argue that the prosecution and conviction of a person de-humanises him or her and thus invades the claimed rights".<sup>36</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid; Moseneke J is correct in holding that these common law jurisdictions do not require a causal link between the participant's act and the ultimate unlawful consequence. However, he ignores the fact that common purpose in its active association form is not recognised in these common law jurisdictions, except in Scotland.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid para 34.

<sup>34</sup> Ibid para 35.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid para 36.

The appellants' second submission related to their right to freedom and security of person. The appellants argued that the doctrine's dispensing of the causal connection requirement amounted to a violation of their right not to be deprived of freedom arbitrarily, as "this mode of criminal liability countenances the most tenuous link between individual conduct and the resultant liability".<sup>37</sup> Moseneke J held that the appellants' constitutional complaint must be directed at the criminal norm in issue, specifically, the standard of criminal culpability required under the doctrine may not unjustifiably limit any Constitutional rights.<sup>38</sup> Moreover, Moseneke J held that the prerequisite of a causal connection is not a definitional element of all crimes; hence the doctrine's dispensing of the requirement does not render the criminal norm constitutionally impermissible.<sup>39</sup> Moseneke J concluded his reasoning by justifying potential violations of freedom and security of persons on the rationally connected legitimate objective of limiting and controlling joint criminal enterprise:

It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime.<sup>40</sup>

The third submission entailed the CC evaluating the appellants' claim that their conviction under the doctrine of common purpose negated their right to be presumed innocent. Section 35(3)(h) of the Constitution provides that every accused has the right to a fair trial, which includes the right to be presumed innocent. Accordingly, the appellants contended that the doctrine, through dispensing with the causal connection requirement, violated their right to be presumed innocent.<sup>41</sup> The CC's endorsement of the doctrine dispensing with the causal requirement led Moseneke J to hold:

The doctrine neither places an onus upon the accused, nor does it presume his guilt. The state is required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose.<sup>42</sup>

The appellants' final submission raised two criticisms leveled by Burchell and Milton:

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<sup>37</sup> Ibid para 35.

<sup>38</sup> Ibid para 36.

<sup>39</sup> Ibid paras 37-8.

<sup>40</sup> Ibid para 40.

<sup>41</sup> Ibid para 43.

<sup>42</sup> Ibid.

- a. The requirement of active association has been cast too widely or misapplied.
- b. There are less invasive forms of criminal liability than convicting a participant in a common purpose as a principal.<sup>43</sup>

On the first criticism, Moseneke J held that the criticism did not render the liability requirement of active association unconstitutional, but reinforced the trial court's obligation "when applying the doctrine of common purpose, to exercise the utmost circumspection in evaluating the evidence against each accused person. The trial court must ascertain, with regard to each accused person in each case, the location, time, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of guilt".<sup>44</sup>

On the second criticism, as Moseneke J found no violation of the contested rights, the CC omitted the proportionality assessment between the extent of the doctrine's violation of constitutional rights and society's need and right to suppress criminal conduct.<sup>45</sup> In conclusion, Moseneke J held:

Despite the evocative history of the application of the doctrine of common purpose in political and other group prosecutions, I am of the view that the common law doctrine of common purpose in murder as set out in *S v Mgedezi* and cases considered in this judgment, does pass constitutional muster and does not, in the context of this case, require to be developed as commanded by section 39(2).<sup>46</sup>

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<sup>43</sup> Ibid para 44; J Burchell and J Milton op cit (n13) at 406-7.

<sup>44</sup> *Thebus* supra (n2) para 45.

<sup>45</sup> Ibid para 48.

<sup>46</sup> Ibid para 50.

## 2.3 AN INTRODUCTION TO THE CHALLENGED CONSTITUTIONAL RIGHTS

A person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot, upon conviction in a fair trial, validly claim that his or her rights to dignity and freedom have been invaded.<sup>47</sup>

For the remainder of this chapter, where reference is made to the doctrine of common purpose, it includes both the prior agreement and active association form of common purpose, unless otherwise stated.

The right to dignity forms the foundational value of the rights infringed by the application of common purpose. The right to dignity, in a criminal law context, which encompasses the principles of culpability, proportionality, and fair labeling, gives much needed content to the relevant limited argument leveled by the appellants in *Thebus*.<sup>48</sup> It will be argued that the doctrine fails to satisfy the three principles rooted in the right to dignity, thus potentially amounting to an infringement of the right.

The argument will expand on the appellants' assertion that the doctrine infringed their right to be presumed innocent, by considering the content of the presumption of innocence. This will reveal that the right will be infringed when a necessary element of a crime is not established and an accused is not afforded viable defences.<sup>49</sup>

Moseneke J's adherence to the precedent set in *De Lange v Smuts*,<sup>50</sup> regarding the threshold test for an alleged violation of the right not to be deprived of freedom arbitrarily or without just cause will be scrutinised. A proper application of the threshold test posits the infringement of an accused's right to freedom and security of person.

An additional constitutional criticism levelled against the doctrine is presented by Burchell, whereby he introduces a participant's potential claim for unfair discrimination.<sup>51</sup> The distinct treatment of certain parties under the application of common purpose warrants investigation.

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<sup>47</sup> *Thebus* supra (n2) para 41.

<sup>48</sup> D Robinson 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925; D Robinson 'The Two Liberalisms of International Criminal law' in C Stahn & L van den Herik eds *Future Perspectives on International Criminal Justice* (2010) 115.

<sup>49</sup> *S v Coetzee* 1997 (3) SA 527 (CC) paras 38, 189; PJ Schwikkard *Presumption of Innocence* (1999) at 41.

<sup>50</sup> *De Lange v Smuts* 1998 (3) SA 785 (CC).

<sup>51</sup> J Burchell *Principles of Criminal Law* 5<sup>th</sup> Ed (2016) at 486.



Thus, the *Harksen* test is presented, which postulates the unfair discrimination of participants to a common purpose.

In conclusion, a limitation analysis is presented, with reference to the court's adoption of a Kantian approach to the interpretation of the limitation of rights. The interpretative approach adopted ultimately determines whether the infringed rights are reasonably and justifiably limited.

## 2.4 THE RIGHT TO DIGNITY AND THE THREE COROLLARY PRINCIPLES

### 2.4.1 *The nature and scope*

In *Thebus*, the appellants contended that the doctrine of common purpose “undermines the fundamental dignity of each person convicted of the same crime with others because it de-individualises him or her. It de-humanises people by treating them, ‘in a general manner as nameless, faceless parts of a group’”.<sup>52</sup> Furthermore, the appellants argued that common purpose violates their dignity, as its application results in the conviction of a crime like murder, which “carries a stigma greater than a conviction on an alternative charge or competent verdict”.<sup>53</sup>

An elucidation of the nature and scope of the right to dignity, in a criminal law context, reveals three corollary principles, namely the principle of culpability; the principle of proportionality; and the principle of fair labeling.<sup>54</sup> The three principles, rooted in the right to dignity, gives content to the appellants’ aforementioned constitutionality contention in *Thebus*. A violation of a principle results in an individual’s right to dignity being infringed. This chapter assesses the appellants’ claim that the doctrine infringes an accused’s right to dignity by scrutinising the doctrine’s adherence to the three corollary principles.<sup>55</sup>

The right to human dignity is considered the most important right in the Constitution, as dignity is the foundation of all rights in the Constitution.<sup>56</sup> Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>57</sup> Human dignity, as expressed in Roman-Dutch Law, was synonymous with self-

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<sup>52</sup> *Thebus* supra (n2) para 35.

<sup>53</sup> *Ibid.*

<sup>54</sup> SA Walker *A Critical Evaluation of the Doctrine of Common Purpose in South African Law* (unpublished LLM thesis, University of KwaZulu-Natal, 2013) at 127; M Kremnitzer & T Hörnle ‘Human Dignity and the Principle of Culpability’ (2011) 44 *Israel LR* 115.

<sup>55</sup> Walker op cit (n54) at 123-41.

<sup>56</sup> The Preamble of the Constitution of the Republic of South Africa 108 of 1996 (‘the 1996 Constitution’); *S v Makwanyane* 1995 6 BCLR 665 (CC); D Davis, H Cheadle and N Haysom *Fundamental Rights in the Constitution: Commentary and cases* (1997) at 70; A Chaskalson ‘Human Dignity as a Foundational Value of Our Constitutional Order’ (2002) 16 *SAJHR* 193; N Goolam ‘Human dignity-our supreme constitutional value’ (2001) 4 *Potchefstroom Electronic Review* 52; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012); S Woolman ‘The Architecture of Dignity’ in D Cornell, S Woolman et al (eds) *The Dignity Jurisprudence of the Constitutional Court* (2013); D Schultziner & GE Carmi “‘Dignitizing’ Constitutions Worldwide: On the Proliferation of Human Dignity in National Constitutions’ (2013), available at [http://works.bepress.com/guy\\_carmi/6](http://works.bepress.com/guy_carmi/6), accessed on 25 August 2016.

<sup>57</sup> The 1996 Constitution.

esteem.<sup>58</sup> Furthermore, the AD has likened human dignity with status, honour and reputation.<sup>59</sup> Kant describes human dignity as the characteristic that gives a person intrinsic worth, which is related to both the individual and the community.<sup>60</sup>

Similarly, the CC has asserted the protection of dignity based on the acknowledgment of the value and worth of all individuals as members of our society.<sup>61</sup> The CC construes dignity as “an entitlement of human beings to be treated as worthy of respect and concern”.<sup>62</sup> In *Dodo*, Ackermann J highlighted the importance of dignity by asserting “human beings are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end”.<sup>63</sup> In *Ferreira v Levin, Vryenhoek v Powell*,<sup>64</sup> Mokgoro J expressed dignity as encompassing Ubuntu, whereby an individual’s full enjoyment of humanness advances society’s interest.<sup>65</sup> The right to dignity, as guaranteed by the Constitution, provides for vertical and horizontal application.<sup>66</sup> Accordingly, dignity is a value that affords interpretation to all personal rights.<sup>67</sup> The ensuing sub-chapters scrutinise the adherence of the doctrine of common purpose to each principle.

#### **2.4.2 The principle of culpability**

The right to human dignity, which encompasses the right to autonomy, accords an individual’s free will, whereby an individual is recognised as an autonomous moral agent.<sup>68</sup> The principle of culpability is rooted in the rule of law, the right to autonomy, and human

<sup>58</sup> GE Devenish *The South African Constitution* (2005) at 62 para 46; H Botha ‘Human Dignity in Comparative Perspective’ (2009) 2 *Stell LR* 171.

<sup>59</sup> Ibid; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A).

<sup>60</sup> GE Devenish op cit (n58) at 61 para 45; HE Jones *Kant’s Principle of Personality* (1971) at 127; O Schachter ‘Human Dignity as a Normative Concept’ (1983) 77 *American Journal of International Law* 848.

<sup>61</sup> S Hoorer ‘Dignity, Criminal Law and the Bill of Rights’ (2004) 121 *SALJ* 304 at 305; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28.

<sup>62</sup> *Makwanyane* supra (n56) para 44; L Ackermann ‘Equality and the South African Constitution: The Role of Dignity’ (2000) 60 *Heidelberg Journal of International Law* 537; *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC) para 45.

<sup>63</sup> Hoorer op cit (n61) at 305; *S v Dodo* 2001 (3) SA 382 (CC) para 38; S Woolman ‘The widening gyre of dignity’ in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) at 197.

<sup>64</sup> *Ferreira v Levin, Vryenhoek v Powell* 1996 1 BCLR 1 (CC).

<sup>65</sup> Ibid para 49.

<sup>66</sup> I Currie & J De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed (2013) at 253; J Dugard *Human Rights and the South African Legal Order* (1978).

<sup>67</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35; P De Vos *South African Constitutional Law in Context* (2014) at 458; N Haysom ‘Dignity’ in H Cheadle, D Davis and N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) at 131; DM Davis ‘Equality: The majesty of legoland jurisprudence’ (1999) 116 *SALJ* 398 at 414; S Cowen ‘Can “dignity” guide South Africa’s equality jurisprudence?’ (2001) 17 *SAJHR* 34 at 34.

<sup>68</sup> Hoorer op cit (n61) at 306; A De Chickera ‘Through the Lens of Dignity: An Essay on Equality and Liberty’ (2009) 4 *The Equal Rights Review* 35 at 40.

dignity.<sup>69</sup> Kremnitzer details the relationship between culpability and the right to human dignity, submitting:

[I]mposing criminal responsibility upon an individual who is not culpable, or punishing him more severely than he deserves according to the degree of culpability, means that the state is using the individual as a means for achieving a purpose external to him (such as preventive, deterrent, or education objectives). Adopting such an approach infringes the individual's right to human dignity.<sup>70</sup>

The principle of culpability is premised on the principle of personal responsibility, which holds that an individual can only be criminally liable if the ultimate unlawful consequence can be attributed to him or her.<sup>71</sup> The principle of personal responsibility prohibits punishment devoid of culpability, even though the punishment may have deterrent or preventive results.<sup>72</sup> It is submitted that the doctrine of common purpose violates the principle of culpability, as the imputation of the principal perpetrator's *actus reus* to all the participants in the common purpose negates the principle of personal responsibility.<sup>73</sup>

Unterhalter discusses the doctrine of common purpose, specifically, what makes one person liable for the acts of another.<sup>74</sup> He submits that the element of causation recognises an individual's blameworthiness for the unlawful consequence.<sup>75</sup> In rebuttal, the doctrine advances individual responsibility due to each participant's commitment to the common purpose.<sup>76</sup> The rebuttal stems from the proposition that "he who proposes should suffer the same criminal liability as he who disposes because of the moral equivalence of their blameworthiness".<sup>77</sup> Unterhalter notes the violation of the principle of personal responsibility by the application of common purpose:

Integral to criminal law is the respect for persons as sovereign actors whose volitional action is freely chosen and not determined...<sup>78</sup> Blame attaches to individuals in virtue of their own

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<sup>69</sup> Kremnitzer et al op cit (n54) at 122.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid at 129, 131; K Huigens 'Dignity and Desert in Punishment Theory' (2003-2004) 27 *Harvard J of L and Public Policy* 33.

<sup>72</sup> Kremnitzer et al op cit (n54) at 131; S Kadish 'The Decline of Innocence' (1968) 26(2) *Cambridge LJ* 273, 274.

<sup>73</sup> Walker op cit (n54) at 132-33.

<sup>74</sup> D Unterhalter 'The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?' (1998) 105 *SALJ* 671.

<sup>75</sup> Ibid at 671-72.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid at 673.

<sup>78</sup> Ibid.

actions because each person is sovereign over his actions and thus responsible for them. The law is rightly reluctant to hold one person responsible for the actions of another, for ordinarily another's actions fall outside the domain over which the individual is sovereign.<sup>79</sup>

A participant in a common purpose may be held liable for conduct that in no way caused or insignificantly contributed to the ultimate unlawful consequence. However, through the operation of law, the doctrine deems the conduct of a participant and a principal perpetrator as equally responsible for the ultimate unlawful consequence. The doctrine fails to recognise a participant as a person who is sovereign over his or her actions and thus responsible for them. Instead, the doctrine only recognises the principal perpetrator as a sovereign person, whose actions determine the blameworthiness and responsibility of all parties to the common purpose. The doctrine thus imposes collective guilt to all parties to the common purpose, the imposition of which runs contrary to Hart's notions of blameworthiness and responsibility.<sup>80</sup>

The right to dignity in South Africa is one of the most fundamental human rights. The right bears a similar importance in German law.<sup>81</sup> In German law, the right to dignity is considered an inviolable right.<sup>82</sup> Accordingly, the principle of culpability, rooted in the right to dignity, is paramount.<sup>83</sup> German law therefore, does not recognise the principle of imputation. German Law accords with Hart's jurisprudence, as it distinguishes between perpetrators and secondary parties, attaching liability to each participant in relation to his or her role in the crime.<sup>84</sup> The German law thus accords with the principle of proportionality -this principle is potentially lost by the application of common purpose in South African law, and the adoption of the German position should be considered.

#### ***2.4.3 The principle of proportionality***

The principle of proportionality holds that "punishment must stand in just proportion to the severity of the crime and the offender's culpability, as disproportionate punishment results in offenders being used as a means for external educational and preventive purposes".<sup>85</sup>

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<sup>79</sup> Ibid at 674.

<sup>80</sup> HLA Hart *Punishment and Responsibility* (1968). A normative assessment of the derogation of a causal nexus in common purpose cases is presented in chapter 3.3.

<sup>81</sup> Ackermann op cit (n56).

<sup>82</sup> MD Dubber 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 *American Journal of Comparative Law* 679 at 699.

<sup>83</sup> Ibid.

<sup>84</sup> MD Dubber 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *Journal of International Criminal Justice* 977 at 979.

<sup>85</sup> Ibid; D van Zyl Smit & A Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 4 *Modern LR* 541; Z Hoskins 'Deterrent Punishment and Respect for Persons' (2011) 8 *Ohio State J of Criminal L*

Proportionality was the central theme of the CC's judgment in *Dodo*,<sup>86</sup> whereby the court decreed the constitutional proportionality requirement of sentences.

The doctrine of common purpose permits the conviction and sentencing of an individual who contributed to a limited extent to the ultimate unlawful consequence as though they were the main perpetrator.<sup>87</sup> Furthermore, the doctrine allows for an individual to be convicted and sentenced for a corollary crime that he or she only foresaw as a possibility, but did not participate in at all.<sup>88</sup> The historical punishment of individuals charged with murder by the application of common purpose highlights the disregard for proportionality, one of the most important principles of a just system of criminal law.<sup>89</sup>

Prior to the death penalty being abolished, participants in a common purpose convicted of murder could be sentenced to death, regardless of the extent of their contribution to the death of the victim. The participants' sentence furthered the government's aim of deterring and preventing violent crimes. The conviction and sentence of death imposed on Ramashamola, the fourth accused in *Safatsa*,<sup>90</sup> exemplifies the submission. The fourth accused was part of the crowd that converged on Dlamini's house. Following Dlamini firing at and wounding one of the individuals in the crowd, Ramashamola shouted that the Deputy Mayor should be killed. As the crowd pelted the deceased, a woman attempted to intervene. Ramashamola proceeded to slap the intervening woman. The Deputy Mayor was later killed.

The AD admitted that "no such causal connection can be found to have been proved. This is particularly obvious in the case of accused Nos 2 and 4".<sup>91</sup> Nevertheless, relying on the doctrine of common purpose, the fourth accused was convicted of murder and sentenced to death.<sup>92</sup> Ramashamola's contribution to the ultimate unlawful consequence was not established, thus the sentence disregarded the proportionality between the punishment and the offender's culpability.<sup>93</sup> Accordingly, the punishment of the Sharpeville Six, most notably Ramashamola, used the offenders as instruments for purposes of deterrence and prevention.

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369; Gur-Arye 'Human Dignity of "Offenders": A Limitation on Substantive Criminal Law' (2012) 6 *Criminal Law & Philosophy* 187.

<sup>86</sup> *Dodo* supra (n63).

<sup>87</sup> See *S v Safatsa* 1988 (1) SA 868 (A); *S v Nzo* 1990 (3) SA (1) (A); *Thebus* supra (n2).

<sup>88</sup> *S v Khumalo* 1991 (4) SA 310 (A); *S v Molimi* 2006 (2) SACR 8 (SCA); *Thebus* supra (n2).

<sup>89</sup> Kremnitzer et al op cit (n54) at 139.

<sup>90</sup> *Safatsa* supra (n87).

<sup>91</sup> Ibid 894F-G.

<sup>92</sup> The death sentence was later overturned after the widespread international criticism of the verdicts and sentences.

<sup>93</sup> E Cameron 'When Judges Fail Justice' (2004) 121 *SALJ* 580 at 582.

The Sharpeville Six case is not the only instance where disproportionate punishment was an issue.<sup>94</sup> The imposition of disproportionate sentences during apartheid was partly due to the fact that the sentencing principles did not account for a participant's culpability.

South Africa now enjoys Constitutional supremacy, whereby proportionality is enshrined in the Constitution, and the sentencing guidelines reflect proportionality in common purpose cases. The application of the doctrine of common purpose during the post-Constitutional dispensation may result in disproportionate punishment, as the sentencing court may either disregard the principle of proportionality or misapply the ambiguous sentencing principles.<sup>95</sup> Proponents of common purpose would argue that the constitutionally-endorsed sentencing guidelines reflect proportionality. Furthermore, the possibility of appealing a sentence mitigates potential disproportionate punishment.<sup>96</sup> However, after detailing the criticism levelled against South Africa's sentencing guidelines, the arguments present a number of potential flaws.<sup>97</sup>

Section 51 of the Criminal Law Amendment Act<sup>98</sup> prescribes minimum terms of imprisonment for a variety of offences. The provision makes specific reference to cases of murder and rape committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose.<sup>99</sup> Section 51(3)(a) provides an exception to the minimum sentences prescribed by the Act. The provision entails a duty on the court, upon satisfaction that substantial and compelling circumstances exist to justify the imposition of a lesser sentence, to impose such lesser sentence.<sup>100</sup> The exception may arguably be relied on in common purpose cases, to give effect to the distinct culpability of the parties to a common purpose.

In *Vilakazi*,<sup>101</sup> Nugent JA emphasised the significance of proportionality, by detailing the CC's judgment in *Dodo*.<sup>102</sup> Nugent JA asserted that the sentencing court cannot assume that the prescribed sentence is an appropriate and proportionate starting point, or even

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<sup>94</sup> See also *R v Ngcobo* 1928 AD 37; *R v Matsitwane* 1942 AD 213; *R v Duma* 1945 AD 410; *R v Mkhize* 1946 AD 197; *R v Shezi* 1948 (2) SA 11; *R v Mgxwiti* 1954 (1) SA 370 (A); *R v Dladla* 1962 (1) SA 307 (A); *S v Macala* 1962 (3) SA 270 (A); *S v Zigqolo* 1980 (1) SA 49 (A); *S v Maxaba* 1981 (1) SA 1148 AD; *S v Khoza* 1982 (3) SA 1019 (A); *Mgedezi* supra (n18); *S v Motaung* 1990 (4) SA 485 (A); *Nzo* supra (n87).

<sup>95</sup> Walker op cit (n54) at 133-5.

<sup>96</sup> Ibid at 133-4.

<sup>97</sup> SS Terblanche *A Guide to Sentencing in South Africa* 3<sup>rd</sup> Ed (2016).

<sup>98</sup> Act 105 of 1997.

<sup>99</sup> Ibid s 51(1).

<sup>100</sup> *S v Malgas* 2001 (1) SACR 469 (SCA).

<sup>101</sup> *S v Vilakazi* 2009 (1) SACR 552 (SCA).

<sup>102</sup> Ibid paras 3, 14, 18, 20; *Dodo* supra (n63).

constitutional.<sup>103</sup> In *SMM*,<sup>104</sup> the SCA noted the importance of proportionality, holding that proportionality to the seriousness of the offence is a higher value which overrides the prescribed sentences.<sup>105</sup> The principle of proportionality is one of the general principles of sentencing, which a judicial officer is tasked with assessing when determining an appropriate sentence.

The two general principles of sentencing relevant to common purpose cases pertain to: (i) the severity of the crime, which also considers the blameworthiness of the offender; and (ii) the interest of society, which refers to the deterrence and prevention of crime.<sup>106</sup> Therefore, the general principles utilised by a judicial officer arguably already includes a participant's culpability in the common purpose, and may result in a mitigating sentence. However, the argument weakens for a number of reasons. First, the interests of society (deterrence and prevention of crime) are deemed more important compared to proportionality.<sup>107</sup> Additionally, Terblanche argues that "courts have a tendency to express the seriousness of a particular crime in general terms, condemning as very serious all crimes of that name".<sup>108</sup> Furthermore, he submits that this problem also plagues the penalty clauses.<sup>109</sup> Terblanche's criticism is especially worrying in common purpose cases.

The CC has emphasised the seriousness of collaborative criminal enterprises, holding that "the phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge".<sup>110</sup> The crime of murder and rape committed in the execution of a common purpose carries a penalty clause.<sup>111</sup> Thus, on face value, crimes committed in pursuance of a common purpose may potentially be regarded as significantly serious, thereby justifying the minimum sentences, which are not necessarily appropriate and proportionate to the crime committed. The interpretation of "substantial and compelling circumstances" does not fare well for a participant in a common purpose seeking to lessen his

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<sup>103</sup> Ibid para 18.

<sup>104</sup> *S v SMM* 2013 (2) SACR 292 (SCA).

<sup>105</sup> Ibid para 18-9.

<sup>106</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540; *Malgas* supra (n100); *Vilakazi* supra (n101); *S v Matyityi* 2011 (1) SACR 40 (SCA); *SMM* supra (n104); *S v PB* 2013 (2) SACR 553 (SCA).

<sup>107</sup> *S v Ndim* 1994 (2) SACR 525 (D) at 536i; *S v Davids* 1995 (1) SACR 365 (A) at 366d; *S v Andhee* 1996 (1) SACR 419 (A) at 424e-f; *S v Di Blasi* 1996 (1) SACR 1 (A) at 9d; *S v Deetlefs* 1996 (1) SACR 654 (A) at 63c-d; *S v Qamata* 1997 (1) SACR 479 (E) at 483a; South African Law Commission Report (Project 82) *Sentencing (A New Sentencing Framework)* (2000) paras 3.1.4.

<sup>108</sup> Terblanche op cit (n97) at 163; *S v Rabie* 1975 (4) SA 855 (A) at 862H; *S v Narker* 1975 (1) SA 583 (A) at 586A; *S v B* 1996 (2) SACR 543 (C) at 553j.

<sup>109</sup> Terblanche op cit (n97) at 163; *S v Rabie* 1975 (4) SA 855 (A) at 862H; *S v Narker* 1975 (1) SA 583 (A) at 586A; *S v B* 1996 (2) SACR 543 (C) at 553j.

<sup>110</sup> *Thebus* supra (n2) para 34.

<sup>111</sup> Section 51(1) of Act 105 of 1997.



or her sentence. The specific reference to the sentence of offenders in common purpose instances curtails the court's readiness to find that lesser participation solely constitutes a substantial and compelling reason.<sup>112</sup>

An offender's degree of involvement in the commission of the crime constitutes a mitigating factor of the sentence.<sup>113</sup> However, the role of common purpose as a possible mitigating factor remains unknown.<sup>114</sup> Furthermore, the ambiguity of the sentencing principles has resulted in judges imposing sentences instinctively, with little consideration of the aggravating and mitigating circumstances of each principle.<sup>115</sup> The criticisms levelled by Terblanche provide for a clearer interpretation of the contrasting sentences imposed by the trial court and the SCA in *Thebus*.

In *Thebus*, the trial court sentenced each of the two appellants to eight years imprisonment, suspended for a period of five years on certain conditions. The SCA had conflicting views regarding the appropriate sentence. Lewis AJA, with Olivier JA concurring, disagreed with Navsa JA's judgment. Navsa JA's judgment exemplifies the criticisms levelled by Terblanche. Navsa JA canvassed the present common purpose case with the same degree of severity of all cases of common purpose and murder, thus justifying the imposition of the prescribed sentence<sup>116</sup> without heeding the argument that penalty clauses may not necessarily be appropriate and proportionate.<sup>117</sup> The degree of involvement of a participant in the commission of the crime constitutes a mitigating factor of the sentence. However, Navsa JA's judgment fails to give effect to the sentencing principles related to the seriousness of an offence, as the principle of proportionality is unassessed. Lewis AJA disagreed with Navsa JA's judgment. First, Lewis AJA agreed that the present case fell within the ambit of the prescribed sentence. Lewis AJA gave effect to the principle of proportionality,<sup>118</sup> but prioritized society's interest of punishment.<sup>119</sup> The SCA's judgment is indicative of South

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<sup>112</sup> Walker op cit (n54) at 134.

<sup>113</sup> *S v Shangase* 1972 (2) SA 410 (N) at 424G-H; *S v Runds* 1978 (4) SA 304 (A) at 310F-G; *S v Jonathan* 1987 (1) SA 633 (A); *S v Stephen* 1994 (2) SACR 163 (W) at 165j; *S v Sinama* 1998 (1) SACR 255 (SCA) at 259c-d.

<sup>114</sup> Terblanche op cit (n97) at 219; *S v Dlamini* 2012 (2) SACR 1 (SCA) para 31.

<sup>115</sup> Terblanche op cit (n97) at 263.

<sup>116</sup> The prescribed sentence pertains to the penalty clause in s 51(1) of Act 105 of 1997.

<sup>117</sup> *Thebus* (SCA) supra (n10) at 36-7.

<sup>118</sup> Ibid para 12.

<sup>119</sup> Ibid para 12-3.

Africa's continued approach, whereby the sentencing principle of one of society's interests, namely punishment, trumps the offence.<sup>120</sup>

It remains uncertain how the distinction between a participant's legal responsibility and the limited participation in the common purpose determines the weight of constituting, either an aggravating or mitigating factor.<sup>121</sup> The lack of guideline as to the impact of various circumstances also leads to inconsistency in sentences.<sup>122</sup> The potential disregard of a participant's culpability and the inconsistent application of the sentencing principles may result in the violation of a person's right to dignity, as proportionality is unassessed or improperly applied. The right to freedom and security of person, which guarantees the right not to be tortured or be treated or punished in a cruel, inhuman or degrading way presupposes the right to dignity, specifically the principle of proportionality.<sup>123</sup>

In *Williams*, the CC assessed the punishment of an offender in light of the right to dignity, asserting that "even the vilest criminal remains a human being possessed of common human dignity."<sup>124</sup> Furthermore, the CC has emphasised that human dignity will be respected only where the persons who are genuinely responsible and worthy of blame are punished.<sup>125</sup> In *Dodo*,<sup>126</sup> Ackermann J asserted that a violation of s 12(1)(e) is an infringement of one's human dignity.<sup>127</sup> Ackermann J delivered a poignant judgment pertaining to the principle of proportionality and its impact on the relationship between one's right to dignity and freedom and security:

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading...Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the

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<sup>120</sup> *Zinn* supra (n106); *S v M* 1994 (2) SACR 24 (A); *S v Sinden* 1995 (2) SACR 704 (A); *S v Samuels* 2011 (1) SACR 9 (SCA); *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) para 22; *S v Mabunda* 2013 (2) SACR 161 (SCA) para 6; *S v EN* 2014 (1) SACR 198 (SCA); *S v Trichart* 2014 (2) SACR 245 (GSJ); *S v Tlale* 2015 (1) SACR 88 (GJ).

<sup>121</sup> Terblanche op cit (n97) at 209.

<sup>122</sup> Sentencing report op cit (n107) para 1.43; See also Discussion Paper 91 (Project 82) *Sentencing (A New Sentencing Framework)* (2000) para 3.1.4; Issue Paper 11 (Project 82) *Sentencing mandatory minimum sentences* (1997) para 2.46; J Midgley, J Steyn and R Graser *Crime and Punishment in South Africa* (1975) at 156; Lund (1980) 4 SACC 53; E Du Toit *Straf in Suid-Afrika* (1981) at 120; J Hogarth *Sentencing as a human process* (1971) at 6; CJ Ogletree 'The Death of Discretion? Reflections on the Federal Sentencing Guidelines' (1988) 101 *Harvard Law Review* 1938 at 1944; S Terblanche 'The Discretionary Effect of Mitigating and Aggravating Factors: A South African Case Study' in JV Roberts *Mitigation and Aggravation at Sentencing* (2011) at 261.

<sup>123</sup> Kremnitzer et al op cit (n54) at 140.

<sup>124</sup> *S v Williams* 1995 (3) SA 632 (CC) para 77.

<sup>125</sup> *Coetzee* supra (n49) para 162.

<sup>126</sup> *Dodo* supra (n63).

<sup>127</sup> *Ibid* para 35.

offence...the offence is being used essentially as a means to another end and the offender's dignity assailed. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.<sup>128</sup>

The failure to account for the principle of proportionality or a misapplication thereof ultimately entails participants to a common purpose being treated as a means to an end.<sup>129</sup> This failure amplifies the ensuing argument that the doctrine violates the principle of fair labelling.

#### **2.4.4 The principle of fair labelling**

Ashworth is accredited with the introduction of the concept of 'representative labelling', whereby he submits "both out of fairness to the individual and in order to ensure accuracy in the penal system, the legal distinction of an offence should fairly represent the nature of the offender's criminality".<sup>130</sup> Glanville Williams relabelled Ashworth's concept of 'representative labelling', 'fair labelling', which arises "when the relevant fault element does not wholly apply to the particulars of the offence stated in the conviction".<sup>131</sup> Ashworth's development of the concept expresses as situations where "widely felt distinctions between kinds of offences and degrees of wrongdoing are represented and signalled by the law, and that offences are subdivided and labelled so as to present fairly the nature and magnitude of the law-breaking".<sup>132</sup> The distinction between the degrees of wrongdoing is based on proportionality, whereby offenders are labelled and punished in proportion to their wrongdoing.

The principle of fair labelling is justified on the "common pattern of thought in society" that "where people reasonably regard two types of conduct as different, the law should try to reflect that difference".<sup>133</sup> The principle of fair labelling ensures that when a crime occurs,

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<sup>128</sup> Ibid para 38.

<sup>129</sup> J Dressler 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence' (2008) 5 *Ohio State Journal of Criminal Law* 427 at 428; Hoctor op cit (n61) at 306; O Lagodny 'Human dignity and its impact on German substantive criminal law and criminal procedure' (1999) 33 *Israel LR* 375 at 578.

<sup>130</sup> A Ashworth 'The Elasticity of *Mens Rea*' in CFH Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) 45 at 56.

<sup>131</sup> G Williams 'Convictions and Fair Labelling' (1983) 42 *Cambridge LJ* 85.

<sup>132</sup> Ashworth et al op cit (n130) at 77.

<sup>133</sup> Ibid.

justice is not only done, but is seen to be done.<sup>134</sup> Fair labelling requires offences to reflect distinctions in moral wrongfulness, as the gravity of offences is reflected through the harm which was caused or threatened and through the accused's personal moral culpability.<sup>135</sup>

The importance of fair labelling of criminal offences is based on a number of legitimate inter-related reasons, which are premised on the communicative function of the criminal offence label.<sup>136</sup> First, counter arguments to Ashworth's proportionality submission rest on the court's sentencing guidelines accounting for the level of a person's wrongdoing. However, the problems noted in relation to the principle of proportionality<sup>137</sup> potentially negate instances when a judicial officer will account for the level of a participant's wrongdoing. Accordingly, as noted by Ashworth, "once the label is entered on the person's criminal record the passage of time will dim recollections of the precise nature of the offence and may result in the label being taken at face value".<sup>138</sup> In effect, the wrongdoing of the defendant and the wrong suffered by the victim will be incorrectly represented to the public.<sup>139</sup>

The communicative function of the criminal offence label encapsulates the declaratory function, whereby the label "symbolises the degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded".<sup>140</sup> As members of the public merely obtain criminal trial outcomes via social media, newspapers, television, radio and other media, the communication of verdicts require fair labelling to ensure fair public opinion.<sup>141</sup> Media reports are inaccurate, as they simply convey the outcome of the trial without discussing the legal intricacies thereof.

Additionally, fair labelling provides communication to the offender, whereby the defendant "knows exactly what he has done wrong and why he is being punished, in order that his punishment appears meaningful to him, not just an arbitrary harsh treatment."<sup>142</sup> Accordingly,

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<sup>134</sup> AP Simester and GR Sullivan *Criminal Law: Theory and Doctrine* 3<sup>rd</sup> Ed (2007) at 30; cf *S v Dzukudas*; *S v Tshilo* 2000 (4) SA 1078 (CC) para 11; *S v Jaipal* 2005 (4) SA 581 (CC) para 20; *S v Basson* 2007 (3) SA 582 (CC) para 25.

<sup>135</sup> B Mitchell 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64 *Modern LR* 393 at 398-9.

<sup>136</sup> J Chalmers & F Leverick 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217 at 223, 226.

<sup>137</sup> See the discussion on the principle of proportionality in chapter 2.4.3.

<sup>138</sup> Ashworth op cit (n130) at 56; V Tadros 'Fair Labelling and Social Solidarity' in L Zedner & JV Roberts (eds) *Principles and Values in the Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 67 at 72.

<sup>139</sup> J Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 *OJLS* 335 at 351.

<sup>140</sup> Chalmers et al op cit (n136) at 226; V Tadros, 'The Homicide Ladder' (2006) 69 *MLR* 601 at 618; *Masiya v DPP* 2007 (8) BCLR 827 para 44.

<sup>141</sup> Chalmers et al op cit (n136) at 228.

<sup>142</sup> Simester and Sullivan op cit (n134) at 31.

fair labelling may have a deterrent effect, as potential offenders may be deterred from causing more harm because they might incur greater condemnation.<sup>143</sup> Fair labelling provides important communication to external agencies, whereby convicted persons may be denied employment based on their criminal record that unfairly labels them.<sup>144</sup>

The common pattern of thought in society is that the law should reflect the difference between two types of conduct.<sup>145</sup> Therefore, where the principal offender commits the murder and a participant merely serves as a look-out, the law should reflect this difference in the type of conduct by fair labelling of the parties. The distinction in the types of conduct, and the label attached thereto will ensure that justice is not only done, but is seen to be done. The label afforded to participants does not give effect to the deterring results of fair labelling, as participants who barely contribute to the commission of the crime may conclude that contributing to a greater extent would carry the same consequences and act accordingly.<sup>146</sup>

The major problem of the unfair label relates to an accused's right to equality. A participant's right to equality is infringed, as individuals who are not participants in a common purpose and commit unlawful conduct similar to a participant in a common purpose would receive the full benefit of fair labelling.<sup>147</sup> There are a number of appropriate and less restrictive alternative convictions in common purpose cases, such as public violence, conspiracy, incitement, attempt, accomplice liability, and any other lesser charge.<sup>148</sup> The alternative convictions would reflect the distinctions in moral wrongfulness, whereby the gravity of offences is reflected through the harm which was caused or threatened and through the accused's personal moral culpability.<sup>149</sup>

The principle of fair labelling in international law is recognised as one of the fundamental principles of criminal law, and characterises a liberal system of criminal justice.<sup>150</sup> South African law's collective treatment of parties to a common purpose fails to recognise the distinction in a participant's wrongdoing. Accordingly, a participant faces social, psychological and economic harms, where it cannot be said that justice is done or seen to be done. It is submitted that had the CC grappled with the jurisprudence on fair labelling, the

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<sup>143</sup> Mitchell op cit (n135) at 398.

<sup>144</sup> Chalmers et al op cit (n136) at 234; Simester and Sullivan op cit (n134) at 31.

<sup>145</sup> Ashworth op cit (n130) at 56, 77.

<sup>146</sup> Mitchell op cit (n135) at 398.

<sup>147</sup> See the discussion on a participant's claim of unfair discrimination in chapter 2.7.

<sup>148</sup> The availability of less restrictive means is scrutinized in chapter 2.8.4.3.

<sup>149</sup> Mitchell op cit (n135) at 398-9.

<sup>150</sup> Robinson (2008) op cit (n48) at 926; Robinson (2010) op cit (n48) at 119-20.

appellants' argument that the doctrine stigmatises and de-humanises people by treating them "in a general manner as nameless, faceless parts of a group" would have succeeded.

## 2.5 GUILTY WITHOUT REASONABLE DOUBT: THE RIGHT TO BE PRESUMED INNOCENT

### 2.5.1 Introduction

In *Thebus*, the appellants argued that the right to be presumed innocent was infringed through the doctrine of common purpose derogating from the causation requirement for consequence crimes. However, the CC held that the derogation of the causation requirement did not infringe the right to be presumed innocent.<sup>151</sup> This chapter expands on the appellants' argument by detailing the nature and scope of an accused's right to be presumed innocent. The content of the right illumines two major arguments premised on the same principle: the possibility of conviction despite the existence of a reasonable doubt will exist when a necessary element of a crime is not established; and an accused is not afforded viable defences.<sup>152</sup>

### 2.5.2 Nature and scope

The right to a fair trial, as guaranteed in s 35(3) of the Constitution, provides an open-list<sup>153</sup> of protection to every accused person, which activates upon determination of the accused's guilt.<sup>154</sup> The presumption of innocence stands as the core right encompassed in the right to a fair trial.<sup>155</sup> Section 35(3)(h) of the Constitution, the right to be presumed innocent, is premised on the conflict against punitive authoritarian state measures and the need to ensure a legitimate criminal justice system.<sup>156</sup> The presumption of innocence, a means to curtail incorrect convictions,<sup>157</sup> finds life through the burden of proof, whereby the state must establish guilt beyond a reasonable doubt.<sup>158</sup>

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<sup>151</sup> The CC's decision was founded on four contentions detailed in the breakdown of the judgment in chapter 2.2.3.

<sup>152</sup> *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

<sup>153</sup> *S v Zuma* 1995 (1) SACR 568 (CC).

<sup>154</sup> Currie et al op cit (n66) at 751.

<sup>155</sup> Section 35(3)(h) Constitution; Ibid at 753.

<sup>156</sup> Currie et al op cit (n66) at 753.

<sup>157</sup> *S v Dlamini* 1999 (2) SACR 51 (CC).

<sup>158</sup> Currie et al op cit (n66) at 753; *Zuma* supra (n176); *Coetzee* supra (n49); *R v Ndhlovu* 1945 AD 369; Schwikkard op cit (n49) at 16, 20-1; V Wilson 'Shifting Burden in Criminal Law: a Burden on Due Process' (1981) 8 *Hastings Constitutional LQ* 731-3.

The right to a fair trial, which encompasses the right to be presumed innocent, is safeguarded by the right to dignity.<sup>159</sup> The Supreme Court of Canada has enunciated the consequences of violating the presumption of innocence, holding:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms.<sup>160</sup>

In order for the State to establish guilt, the State must prove beyond a reasonable doubt the voluntary conduct, unlawfulness, causation (in consequence crimes), criminal capacity and fault of the accused. The CC thus held “guilt is only established when it is clear that the accused has no defence and that all the particular elements of the particular crime have been established”.<sup>161</sup>

The scope of the presumption of innocence, specifically the requisite elements to establish an accused’s guilt, has been clarified by Sundby’s three approaches.<sup>162</sup> The first approach, expansive proceduralism, entails the presumption of innocence being applicable to all facts, including the elements, defences, exemptions, exceptions and excuses.<sup>163</sup> The second approach, restrictive proceduralism, applies the presumption of innocence only to the facts encompassing the elements of a crime.<sup>164</sup> The third approach, substantivism, applies the burden of proof to facts that constitutionally warrant punishment.<sup>165</sup> Schwikkard, favoring Sundby’s substantivism approach, asserts:

In the South African context where recognition is given at common law to comprehensive principles of criminal liability, the substantive approach would require that any fact which pertains to the existence of a fact which must be established in order for the state to constitutionally punish a person, must be proved beyond a reasonable doubt.<sup>166</sup>

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<sup>159</sup> *Dzukuda* supra (n134) para 11; *Zuma* supra (n153) para 22; *Coetzee* supra (n49) para 121; Hoctor op cit (n61) at 307.

<sup>160</sup> *R v Oakes* 1986 50 CR (3d) 1 SCC; Schwikkard op cit (n49) at 13.

<sup>161</sup> *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

<sup>162</sup> SE Sundby ‘The Reasonable Doubt Rule and the Meaning of Innocence’ (1988) 40 *Hastings Law Journal* 457.

<sup>163</sup> *Ibid* at 464-65; Schwikkard op cit (n49) at 43-4.

<sup>164</sup> *Ibid*.

<sup>165</sup> Sundby op cit (n162) at 476.

<sup>166</sup> Schwikkard op cit (n49) at 45.



Correspondingly, in *Zuma*, Kentrige AJ held: “the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt”.<sup>167</sup>

Moseneke J affirmed the doctrine’s derogation of the causal nexus requirement on the basis that without the derogation, the prosecution of collaborative criminal enterprises would be intractable and ineffectual. The affirmation contradicts the CC’s earlier judgment in *Mbatha, Prinsloo*, whereby the CC asserted that an infringement of the presumption of innocence cannot be justified by relying on the need to prevent the alleged guilty party escaping conviction.<sup>168</sup> Moseneke J’s reliance on utilitarian instrumental arguments,<sup>169</sup> whilst disregarding earlier CC decisions,<sup>170</sup> has created a false finding that the doctrine of common purpose complies with an accused’s right to be presumed innocent. This is mistakenly bolstered through Moseneke J’s holding that the derogation of a causal nexus does not violate the presumption of innocence:

In my view, when the doctrine of common purpose is properly applied, there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to his or her guilt. In my view, the common purpose doctrine does not trench the right to be presumed innocent.<sup>171</sup>

An accurate description of the presumption of innocence, coupled with Burchell’s arguments on the matter,<sup>172</sup> serves as the foundation of the rebuttal against Moseneke J’s arguments. There are two major arguments that support the submission that an accused’s right to be presumed innocent, whose conviction is secured by the application of common purpose, is infringed. The arguments entail the possibility of conviction despite the existence of a reasonable doubt being present when the necessary elements of the crime have not been established and the accused has not been afforded viable defences.<sup>173</sup> Furthermore, the application of common purpose in instances where the identity of the principal perpetrator is unknown will bolster each argument.

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<sup>167</sup> *Zuma* supra (n153). The case concerned an infringement of the presumption of innocence in relation to a reverse-onus provision. However, the sentiment of Kentrige AJ pertains to any conviction despite the existence of a reasonable doubt.

<sup>168</sup> *S v Mbatha; S v Prinsloo* 1996 (3) BCLR 293 (CC) at 20.

<sup>169</sup> The reliance on utilitarian instrumental arguments is scrutinised in chapter 2.8.4.2.

<sup>170</sup> Moseneke J’s disregard of earlier CC decisions, which includes *Makwanyane* supra (n56) para 121 and *Dlamini* supra (n172), is detailed in chapters 2.8.4.1 and 2.8.4.2.

<sup>171</sup> *Thebus* supra (n2) para 43.

<sup>172</sup> Burchell op cit (n51) at 491-2.

<sup>173</sup> *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

### 2.5.3 Causation: a necessary element of consequence crimes

Burchell agrees with Moseneke J's initial submission that "the requirement of a causal nexus is not a definitional element of every crime",<sup>174</sup> as circumstance crimes do not necessitate a causal nexus requirement. Burchell faults the CC's failure to ascribe the definitional elements of certain crimes devoid of the requirement of causation. He focuses on South African criminal law's accepted principle of requiring a causal nexus for consequence crimes. The doctrine of common purpose is predominantly applied to murder cases; thus Burchell submits that the causation requirement constitutes a definitional element of the crimes commonly charged:

...the common-purpose rule goes even further and conclusively imputes the causal contribution of one person in a common purpose to another participant...the imputation rule dispenses altogether with the normal requirement in consequence crimes of a causal link...the prosecution does not even have to adduce any evidence of such a causal link.<sup>175</sup>

The CC's assertions in *Coetzee*, whereby "guilt is only established when it is clear that the accused has no defence and that all the particular elements of the particular crime have been established",<sup>176</sup> coupled with Sundby's substantivism approach, whereby "any fact which pertains to the existence of a fact which must be established in order for the state to constitutionally punish a person, must be proved beyond a reasonable doubt",<sup>177</sup> thwart the CC's derogation of a causal nexus for consequence crimes. The effect of the deviating definitional elements of similar crimes infringes an accused's right to be presumed innocent.

The submission of infringement finds authority in Kentridge AJ's assertions in *Zuma*, whereby "the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt".<sup>178</sup> Accordingly, the possibility of conviction despite the existence of a reasonable doubt will exist when the necessary elements of the crime have not been established.<sup>179</sup>

Moseneke J supports the imputation of causation on the basis that "it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to

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<sup>174</sup> *Thebus* supra (n2) para 37; Burchell op cit (n51) at 491: Causation is not a requirement for circumstance crimes.

<sup>175</sup> Burchell op cit (n51) at 492.

<sup>176</sup> *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

<sup>177</sup> Sundby op cit (n162) at 476; Schwikkard op cit (n49) at 45.

<sup>178</sup> *Zuma* supra (n153).

<sup>179</sup> *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

the criminal result”.<sup>180</sup> The derogation of the causal element is founded on the social need to control crime committed in the course of joint enterprises. Appropriately, Kremnitzer delineates the consequence of guilt devoid of satisfying the requisite criminal elements:

It no longer turns to the perpetrator with well-founded approbation, it speaks over his head, and at his expense, in so doing transforming the offender into a means of achieving extrinsic ends.<sup>181</sup>

The imputation of causation from the principal perpetrator to a participant in the common purpose violates the fundamental criminal law principle that in consequence crimes an accused’s guilt, which includes the indispensable requirement of causation, must be proved beyond a reasonable doubt. The necessary element of causation that remains unestablished entails the possibility of conviction despite the existence of a reasonable doubt, thus infringing the right to be presumed innocent.<sup>182</sup>

The application of common purpose in instances where the identity of the principal perpetrator is unknown evinces a further infringement of an accused’s right to be presumed innocent.<sup>183</sup> The absence of a principal perpetrator entails the prosecution being relieved of establishing the necessary requirement of causation altogether, as the element of causation cannot be assessed in light of a particular person. Therefore, the application of common purpose would impute a limited or non-existent causation, which has not been established, and impute it to the other participants in the common purpose.

#### ***2.5.4 Unavailable viable defences***

The right to be presumed innocent requires an accused to be afforded all viable defences, as the unavailability of viable defences results in the possibility of conviction despite the existence of a reasonable doubt.<sup>184</sup> The imputation of causation in instances where the identity of the principal perpetrator is both known and unknown results in an additional infringement of the right to be presumed innocent, as viable defences are not afforded to the participants.

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<sup>180</sup> *Thebus* supra (n2) para 34.

<sup>181</sup> M Kremnitzer ‘Constitutional principles and criminal law’ (1993) 27 *Israel LR* 84 at 96; Hoctor op cit (n61) at 309.

<sup>182</sup> *Zuma* supra (n153); *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

<sup>183</sup> The application of the doctrine in this instance is delineated in the preface (page 2).

<sup>184</sup> *Coetzee* supra (n49) paras 38, 189; Schwikkard op cit (n49) at 41.

In instances where the identity of the perpetrator is known, the prosecution must prove causation beyond a reasonable doubt. The factual and legal causation tests would be assessed entirely for the principal perpetrator. Furthermore, the principal perpetrator would be afforded all the viable defences excluding causation. If the prosecution establishes causation on the part of the principal perpetrator, the causation element would be imputed to all participants to the common purpose. The imputation of causation results in the prosecution being relieved of the necessity to establish causation on the part of the participants. The necessary factual and legal causation tests would not be assessed at all for the participants, and any possible defences excluding causation would be rendered nugatory. A similar and even more dire outcome results where the doctrine is applied in instances where the identity of the principal perpetrator is unknown.

The prosecution's failure to identify the principal perpetrator means that causation – the factual and legal tests thereof – are not assessed at all. Any possible defence excluding causation available to the principal offender is unaccounted for and the nonexistent causation element is still imputed to all other participants. In effect, the participants may be convicted despite guilt not being proven beyond a reasonable doubt, as a viable defence excluding causation of the unknown principal perpetrator remains uncontested, yet imputed. The participants would then also suffer from the same unfair and unjust disregard of their own possible defences excluding causation.

In *Zuma*, the CC held that the constitutional right to a fair trial embraced “a concept of substantive fairness that required criminal trials to be conducted in accordance with just those notions of basic fairness and justice”.<sup>185</sup> Similarly, in *Dzukuda*, the CC held that at the heart of the right to a fair trial is for justice to be done and also to be seen to be done.<sup>186</sup> Burchell concludes:

The right to a fair trial requires that the trial be conducted in accordance with ‘notions of basic fairness and justice’ and these notions are not confined to procedural justice. ‘Imputing’ or ‘transferring’ conduct from one person to another is not in keeping with fundamental notions of fairness and justice and, in fact, smacks of guilt by association.<sup>187</sup>

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<sup>185</sup> *Zuma* supra (n153) para 16.

<sup>186</sup> *Dzukuda* supra (n134) para 11.

<sup>187</sup> J Burchell ‘Joint enterprise and common purpose: perspectives in English and South African criminal law’ (1997) 10 *SACJ* 120 at 140.

Burchell's assertion is amplified in instances where the identity of the principal perpetrator is unknown. The imputation of the non-established causation element contradicts the doctrine of common purpose, which is founded on the imputation of causation. A participant's right to be presumed innocent is infringed, as the necessary element of causation, even though imputed and the availability of viable defences, are not established. In light of the apparent crime control fervour of the CC in *Thebus*, justice is seen to be done, but it is certainly not done.

## 2.6 A PRINCIPLED APPROACH TO THE RIGHT TO FREEDOM AND SECURITY OF PERSON

In *Thebus*, the CC assessed the appellants' argument that the doctrine infringes their right to freedom and security of person. This chapter begins by detailing the enquiry set out in *De Lange v Smuts*;<sup>188</sup> and thereafter scrutinises Moseneke J's adherence to the enquiry to negate the appellants' claim.<sup>189</sup>

Section 12 of the Constitution guarantees that everyone has the right to freedom and security of person, which includes the right not to be deprived of freedom arbitrarily or without just cause.<sup>190</sup> The right to freedom and security of the person encompasses substantive<sup>191</sup> and procedural<sup>192</sup> protection, whereby an infringement requires justification under the limitation clause. The CC notes that the substantive protection concerns the right not to be deprived of liberty for reasons that are not acceptable.<sup>193</sup> Additionally, the procedural protection is concerned with the manner whereby a person is deprived of freedom, provided by the right not to be detained without trial.<sup>194</sup> The threshold for an alleged violation of the right not to be deprived of freedom arbitrarily or without just cause entails a two-stage assessment, namely: (i) whether the deprivation in question is 'arbitrary'; and, if not, (ii) whether it is for a 'just cause'.<sup>195</sup>

The first stage of the assessment necessitates "a rational connection between the deprivation and some objectively determinable purpose" in order for the deprivation of freedom to not be arbitrary.<sup>196</sup> On the second stage of the assessment, Ackermann J asserted that "the concept of 'just cause' must be grounded upon and consonant with the values expressed in s 1 of the Constitution and gathered from the provisions of the Constitution as a whole".<sup>197</sup> Ackermann J considered a number of factors indicative of a 'just cause', namely: the nature and extent of

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<sup>188</sup> *De Lange v Smuts* 1998 (3) SA 785 (CC).

<sup>189</sup> Walker op cit (n54) at 110-19; In *Coetzee* supra (n49) para 160, O'Regan J intimates that the lowering of the culpability norm would not give rise to a challenge under the fair trial provision of the Constitution, but may give rise to successful challenge under s 11 of the Interim Constitution (s 12 of the Final Constitution).

<sup>190</sup> Section 12(1)(a) of the 1996 Constitution.

<sup>191</sup> Ibid.

<sup>192</sup> Section 12(1)(b) of the 1996 Constitution.

<sup>193</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) at 510-511; *De Lange* supra (n188) at 794; *Coetzee* supra (n49) para 159.

<sup>194</sup> Ibid.

<sup>195</sup> *De Lange* supra (n188) para 23.

<sup>196</sup> Ibid; IM Rautenbach 'The limitation of rights in terms of provisions of the bill of rights other than the general limitation clause: a few examples' (2001) *Journal of South African Law* 617 at 631.

<sup>197</sup> *De Lange* supra (n188) para 30.

the limitation; the importance of its purpose; the relationship between the limitation and its purpose; and whether that purpose could be achieved by less restrictive means.<sup>198</sup> Accordingly, the determination of a ‘just cause’ entails a proportionality enquiry, similar to that which a court performs under a s 36 limitations analysis. Ackermann J’s majority judgment in *De Lange* set the threshold precedent concerning the determination of a violation of the right not to be deprived of freedom arbitrarily or without just cause. Therefore, the determination of such a violation in *Thebus* necessitates an adherence to the precedent set in *De Lange*.

In *Thebus*, Moseneke J’s assessment of the threshold enquiry for s 12(1)(a) of the Constitution falls short of the enquiry set in *De Lange*. Moseneke J dispenses with the first stage of the enquiry by simply holding that “common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise”.<sup>199</sup> Moseneke J fails to support his claim that there is a causal link between the doctrine and crime control. The CC justifies the causal link based on instrumental arguments of the crime control benefits of common purpose.<sup>200</sup>

Thereafter, Moseneke J justifies the second stage of the threshold enquiry by attesting the crime-control benefits of the doctrine.<sup>201</sup> Moseneke J’s assessment of the second stage focused exclusively on the purpose of the limitation and the importance of that purpose. The CC disregarded the other factors that indicate whether the deprivation is for a ‘just cause’, such as: whether the doctrine is an appropriate and fitting means for achieving the purpose, or whether it goes further than strictly necessary; and whether the same objective could be achieved equally well by less invasive means. The CC viewed these factors as ‘proportionality arguments’, holding that they were only relevant to a general limitations analysis.<sup>202</sup> In assessing whether the deprivation is a ‘just cause’, Schwikkard contends that the CC failed to consider what the minimum standard of criminal culpability ought to be.<sup>203</sup>

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<sup>198</sup> Ibid paras 31-41; Rautenbach op cit (n196) at 632.

<sup>199</sup> *Thebus* supra (n2) para 40.

<sup>200</sup> The CC’s reliance on utilitarian instrumental arguments is scrutinised in chapter 2.8.4.2.

<sup>201</sup> *Thebus* supra (n2) para 40.

<sup>202</sup> Ibid para 48.

<sup>203</sup> PJ Schwikkard ‘Instrumental Arguments in Criminal Law: A Mirage of Tensions’ (2004) 121 *SALJ* 298 at 301-3. Moseneke J provides a positivist argument for criminal culpability in *Thebus* para 38: “There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so.”

The arguments leveled by Moseneke J to satisfy the threshold enquiry required under s 12(1)(a) of the Constitution were condemned by both Burchell and Schwikkard. They contended that the CC utilised instrumental arguments to justify the assessment of the threshold enquiry.<sup>204</sup> Moseneke J contends that “absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime”.<sup>205</sup> However, as Burchell submits, there are a number of less restrictive means available for punishing individuals who unlawfully and intentionally participate in the commission of crimes, such as convicting the individuals as accomplices or charging the individuals with lesser crimes.<sup>206</sup> Furthermore, Schwikkard notes Moseneke J’s reliance on instrumental arguments, as no evidence is tendered to support the claim, firstly, that the doctrine achieves the purpose of crime control, and secondly, that the doctrine is the only law capable of criminalising crimes by common design.<sup>207</sup>

It is submitted that on a proper application of the threshold precedent set in *De Lange*, the CC in *Thebus* would have concluded that the doctrine of common purpose violates an individual’s right not to be deprived of freedom arbitrarily or without just cause.

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<sup>204</sup> The CC’s reliance on instrumental arguments and the validity of those arguments are discussed later in chapters 2.8.4.1 and 2.8.4.2.

<sup>205</sup> *Thebus* supra (n2) para 40.

<sup>206</sup> J Burchell ‘S v Nzo 1990 (3) SA (1) (A) Common-Purpose Liability’ (1990) 3 *SACJ* 345.

<sup>207</sup> Schwikkard op cit (n203).



## 2.7 THE RIGHT TO EQUALITY: UNFAIR DISCRIMINATION ON ANALOGOUS GROUNDS

The appellants in *Thebus* did not cover all the arguments levelled against the constitutionality of the doctrine. Burchell, noting the distinct treatment of categories of accused people, contends:

...the common-purpose rule could also be said to treat a particular category of accused people unequally in contrast to accused persons, who are charged with committing consequence crimes, but who are not engaged in a common purpose.<sup>208</sup>

There are two instances of contrasting treatment amongst particular categories of accused people. The first is that explained by Burchell in the above quote. The second instance relates to the distinct treatment between participants in the common purpose and the principal perpetrator thereof. Both instances suggest a claim of unfair discrimination. Accordingly, the ensuing sub-chapter evaluates this proposition by applying the test for unfair discrimination delineated in *Harksen v Lane*.<sup>209</sup>

The equality provisions of the Constitution provide everyone with equality before the law, which includes the full and equal enjoyment of all rights and freedoms, and prohibits unfair discrimination on the listed and analogous grounds.<sup>210</sup> The CC stresses that “like justice, equality delayed is equality denied”.<sup>211</sup> The right to equality encompasses both formal and substantive equality.<sup>212</sup> Human dignity forms the foundation of the right to equality, whereby every person must be treated with equal respect and worth.<sup>213</sup> Accordingly, the right to equality, guaranteed in s 9 of the Constitution, safeguards a person from differentiation premised on one of the listed grounds or analogous grounds that have the potential to infringe a person’s human dignity.<sup>214</sup> The CC has premised human dignity as the cornerstone of an

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<sup>208</sup> Burchell op cit (n51) at 486.

<sup>209</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>210</sup> The 1996 Constitution.

<sup>211</sup> *National Coalition Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 60.

<sup>212</sup> Ibid.

<sup>213</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41; *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 50; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality* supra (n211); A Chaskalson ‘Human Dignity as a foundational value of our constitutional order’ (2000) 16 *SAJHR* at 203.

<sup>214</sup> De Vos op cit (n67) at 427.

equality enquiry.<sup>215</sup> Malherbe’s famous quotation captures the relationship between dignity and equality: “[E]quality without dignity is inhuman”.<sup>216</sup>

The listed grounds contained in s 9 do not formally recognise the contrasting treatment of the categories of people, namely: participants to the common purpose; the principal perpetrator; and accused persons charged with a consequence crime but not engaged in a common purpose.<sup>217</sup> However, as s 9 prohibits unfair discrimination based on analogous grounds, the differentiation between the categories of persons must be assessed in light of the relevant two-pronged test.<sup>218</sup>

First, the differentiation relates to the unequal treatment of people based on “attributes and characteristics attaching to them” that are not related to the specified grounds but are nevertheless comparable to them,<sup>219</sup> namely: (i) the existence of a common purpose; and (ii) the person’s degree of participation in the common purpose.<sup>220</sup> The existence of a common purpose determines whether the principles related to common purpose are applied, whereby the state does not need to determine the causal nexus between a participant’s act and the ultimate unlawful consequence. In contrast, the non-existence of a common purpose entails the application of the ordinary principles of criminal law.

The second stage involves the determination of the effect of the differentiation.<sup>221</sup> The effect must impair the person’s fundamental dignity or affect the person adversely in a comparably serious manner.<sup>222</sup> A participant in a common purpose has his or her rights to dignity,<sup>223</sup> presumption of innocence,<sup>224</sup> and freedom and security of person<sup>225</sup> infringed by the court’s differentiating treatment. The differentiation, which is based on an analogous ground, thus

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<sup>215</sup> *Hugo supra* (n213) para 41: “At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups”

<sup>216</sup> R Malherbe ‘Some thoughts on unity, diversity and human dignity in the new South Africa’ (2007) 70 *SALJ* 132.

<sup>217</sup> Section 9(3) of the 1996 Constitution.

<sup>218</sup> *Harksen supra* (n209) para 46.

<sup>219</sup> The treatment of accused persons are comparable to any one of the listed grounds, as the commonality between the grounds is that “they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics.”

<sup>220</sup> *Harksen supra* (n209) para 46.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> See the discussion on the violation of an accused’s right to dignity in chapter 2.4.

<sup>224</sup> See the discussion on the violation of an accused’s right to a fair trial in chapter 2.5.

<sup>225</sup> See the discussion earlier on the violation of an accused’s right to freedom and security of person in chapter 2.6.

amounts to discrimination. The discrimination is indirect, as the practice, while appearing neutral, has an effect or result that is unequal and disproportionately affects an accused person.<sup>226</sup>

At this point in the enquiry, a participant in a common purpose bears the onus of proving that the discrimination is unfair by assessing the impact of the discrimination on the complainant and others in his or her situation.<sup>227</sup> The CC has detailed some factors that guide the enquiry as to whether the discriminatory provision has an unfair impact on a complainant: (i) the position of the complainants in society; (ii) the nature of the provision or power and the purpose sought to be achieved by it; and (iii) any other factor that impairs a person's fundamental dignity or constitutes an impairment of a comparably serious manner.<sup>228</sup> The position of a participant in a common purpose in society is identical to that of most accused persons in South Africa. The majority of accused persons are indigent, thus navigating a trial without the effective assistance of a defence lawyer renders the possibility of contesting a charge in terms of the doctrine of common purpose improbable.<sup>229</sup> The doctrine is a law directed at controlling crime. However, there is no evidence to establish its effectiveness, and as Burchell submits, there are a number of alternative, less restrictive means available to satisfy the need to suppress joint enterprise crimes.<sup>230</sup> The other factors that impair a person's fundamental dignity or impair a person in a comparably serious manner relate to the criminal law legal principles that the doctrine violates.<sup>231</sup>

In *Thebus*, the CC merely referenced the “evocative history of the application of the doctrine of common purpose in political and other group prosecutions”.<sup>232</sup> For the purpose of the *Harksen* test, the court would not be able to ignore the substantial and compelling criticism leveled against the application of the doctrine in a number of cases, most notably in *Safatsa* and *Nzo*, as the determination of unfair discrimination must take cognisance of South Africa's related history,<sup>233</sup> coupled with the structural inequality that promotes and perpetuates the

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<sup>226</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); *S v Jordan* 2002 (6) SA 642 (CC).

<sup>227</sup> *Harksen* supra (n209) para 50(b).

<sup>228</sup> *Ibid* para 50.

<sup>229</sup> *NC Steytler The undefended accused on trial* (1988); M Bekker ‘The Right to Legal Representation, Including Effective Assistance, for an Accused in the Criminal Justice System of South Africa’ (2005) 37 *The Comparative and International Law Journal of Southern Africa* 173 at 174.

<sup>230</sup> Burchell op cit (n51) at 486-487.

<sup>231</sup> See chapter 3 for a discussion of the doctrine's adherence to criminal law principles.

<sup>232</sup> *Thebus* supra (n2) para 50.

<sup>233</sup> See chapter 1.2 for a historical account of the doctrine of common purpose.

subordination of certain individuals.<sup>234</sup> It seems possible, if not probable, that on a proper application of the *Harksen* test, the treatment of participants in a common purpose, in contrast to the principal perpetrator or an accused person charged with a consequence crime but not engaged in a common purpose, would amount to unfair discrimination.

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<sup>234</sup> *National Coalition for Gay and Lesbian Equality* supra (n211) para 22.

## 2.8 A KANTIAN APPROACH TO A LIMITATION CLAUSE

### 2.8.1 Introduction

In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.<sup>235</sup>

It has been demonstrated that the doctrine of common purpose potentially infringes a number of rights guaranteed in the Bill of Rights. Section 36 of the Constitution, which governs the situations in which constitutional rights may be limited, enjoins a court to balance five relevant factors, namely: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose.<sup>236</sup> Ramraj submits that the relevant factors to be considered in a s 36 limitation clause analysis allow for both a utilitarian and a Kantian interpretation.<sup>237</sup> The CC has vacillated between the two approaches, thereby rendering a conclusive limitation analysis unpredictable.<sup>238</sup> Upon scrutinising the distinction between the approaches, coupled with their adoption in a number of cases, this thesis endorses the Kantian approach. In light of the supported Kantian approach, a limitation analysis will be presented to ascertain whether the infringement of the relevant rights discussed is reasonable and justifiable.

### 2.8.2 The utilitarian approach<sup>239</sup>

The utilitarian approach warrants the limitation of constitutional rights as instrumentally important in securing pressing social objectives. The CC, in adopting a utilitarian approach merely seeks to balance the right and the countervailing legislative interest or objective. Ramraj contends that “the language we would expect to find in the corresponding legal judgments would be the language of *balance* and *weight*”.<sup>240</sup> He presents the case of

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<sup>235</sup> *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) para 13.

<sup>236</sup> D Meyerson *Rights Limited* (1997) at 36-43; *Makwanyane* supra (n56) para 104.

<sup>237</sup> V Ramraj ‘Freedom of the person and the principles of criminal fault’ (2002) 18 *SAJHR* 252.

<sup>238</sup> Compare the judgments of *S v Mamabolo* 2001 (3) SA 409 (CC); *S v Dlamini* 1999 7 BCLR 771 (CC); *S v Manamela* 2000 (3) SA 1 (CC).

<sup>239</sup> Based on John Stuart Mill’s utilitarian theory.

<sup>240</sup> Ramraj op cit (n237) at 253.

*Mamabolo*<sup>241</sup> as an example of the utilitarian approach and a warning of the problems the approach crafts. In *Mamabolo*, the CC assessed whether the offence of scandalising the court limited the right to freedom of expression. Kriegler J repetitively measured the weight and balance of the right against the societal objective of preserving public confidence in the administration of justice.<sup>242</sup>

Ramraj notes a number of problems manifested by Kriegler J's adoption of the utilitarian approach. First, the CC provides no insight into the manner in which the weight of the competing interests is determined.<sup>243</sup> Secondly, the CC balances and weighs competing interests that are disparate.<sup>244</sup> Lastly, Ramraj questions the competency of the court in measuring the public's confidence in the administration of justice.<sup>245</sup> Ramraj then asserts that the concurring judgment of Sachs J in *Mamabolo* can "explain how a non-utilitarian approach can be reconciled with the limitation clause".<sup>246</sup> Sachs J contends that the limitation of rights is not merely dependent on a utilitarian weighing of costs and benefits, but rather "as part of a broader framework of rights in which rights are subject to limitation only to protect the framework of the rights itself".<sup>247</sup> The concurring judgment of Sachs J introduces the Kantian approach to the interpretation of the limitation analysis.

### **2.8.3 The Kantian approach**

The Kantian approach recognises the autonomy of each individual. Constitutional rights are founded on the respect for an individual's autonomy and dignity, thus prohibiting the person from being used as a means to achieve collective welfare. Alan Brudner, who discussed the approaches in relation to Canadian law, holds that on the Kantian approach, a right "can never be reduced to an interest with a certain value and then be traded off whenever necessary to produce greater overall value".<sup>248</sup> Furthermore, Brudner explains a Kantian approach to limiting a right:

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<sup>241</sup> *Mamabolo* supra (n238).

<sup>242</sup> Ibid para 48-49.

<sup>243</sup> Ramraj op cit (n237) at 254.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid at 255.

<sup>247</sup> Ibid; *Mamabolo* supra (n238) para 71, 78.

<sup>248</sup> A Brudner 'Guilt under the Charter: The Lure of Parliamentary Supremacy' (1998) 40 *Criminal LQ* 291; cited in Ramraj op cit (n237) at 255.

Special reasons are needed to limit or override the right, reasons that are consistent with the rights existence. One cannot limit or override the right by ordinary reasons of public welfare.<sup>249</sup>

Ramraj upholds the Kantian approach, as courts are addressing the jurisprudential content of the nature of rights, rather than balancing intangible interests.<sup>250</sup> Furthermore, the Kantian approach endorses the competency of CC judges.<sup>251</sup> Ramraj concludes:

Whether the circumstances are so compelling that the framework of the rights itself is threatened is not simply an empirical question to be settled by a mechanical application of a utilitarian cost-benefit calculus, but rather a fundamental normative question based on an understanding of constitutional rights that is grounded in the dignity of the person- and, in this case, of an accused person- as an autonomous being capable of choosing freely to do wrong.<sup>252</sup>

In *Thebus*, Moseneke J holds that the appellants' claim that the doctrine of common purpose infringes the rights to dignity, freedom and security of person, and the presumption of innocence, "rests on the assumption that common purpose invades a constitutionally protected right to a degree disproportionate to the need and objective of crime control".<sup>253</sup> Despite the CC holding that common purpose did not limit any of the rights asserted by the appellants, and thus not undertaking a limitation analysis, Moseneke J's crime control balancing assertions are indicative of the adoption of a utilitarian approach. If the constitutionality of the doctrine of common purpose was challenged in its entirety, as Moseneke J in *Thebus* suggests it should have been,<sup>254</sup> the adoption of either a utilitarian or Kantian approach will determine not only the ambit of fundamental rights, but also the shape of substantive criminal law.<sup>255</sup>

For the purpose of this thesis, the limitation analysis is premised on a Kantian approach. Two of the factors relevant for the limitation analysis, namely, the nature of the right and the nature and extent of the limitation, have been discussed in the entirety of this chapter. Thus, the remaining three factors will be discussed below.

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<sup>249</sup> Brudner op cit (n248) at 292.

<sup>250</sup> Ramraj op cit (n237) at 256.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid at 257.

<sup>253</sup> *Thebus* supra (n2) para 48.

<sup>254</sup> Ibid para 23.

<sup>255</sup> Ramraj op cit (n237) at 252.

## 2.8.4 Section 36 of the Constitution

### 2.8.4.1 The importance of the purpose of the limitation

Reasonableness requires the limitation to serve some purpose, whilst justifiability requires the purpose to be important in a constitutional democracy.<sup>256</sup> There is undoubtedly a need to control crime so as to realise everyone's constitutionally protected rights.<sup>257</sup> Chaskalson P's judgment in *Makwanyane* cogently captures this, holding that "the need for a strong deterrent to violent crime is an end the validity of which is not open to question".<sup>258</sup>

The Constitution guarantees everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence.<sup>259</sup> The CC and the SCA have also placed a legal duty on the state, to protect persons from violent crime.<sup>260</sup> The principal object of the doctrine of common purpose, as declared by Moseneke J in *Thebus*, is "to criminalise collective criminal conduct and thus to satisfy the social 'need to control crime committed in the course of joint enterprises'".<sup>261</sup> The application of the doctrine throughout the apartheid regime served as a government tool to criminalise black people.<sup>262</sup> The application of the doctrine in the Constitutional-era attempts to satisfy the State's duty to protect persons from violent crime.

The limitation, being the application of the doctrine of common purpose, is purely directed at crime control.<sup>263</sup> Crime control is important; however, it should not solely vindicate the violation of constitutional rights. Interpreting the limitation of rights according to a Kantian approach ensures that individuals are not used as a means to an end; an end being the deterring and effective prosecution of the legitimate pressing social need of group, organised or collaborative misdeeds.<sup>264</sup> The CC's judgment in *Dlamini*<sup>265</sup> hinted at the adoption of a

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<sup>256</sup> Currie et al op cit (n66) at 167; *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) para 36; *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC) para 52.

<sup>257</sup> *S v Mbatha* 1996 (2) SA 464 (CC) para 16; *Manamela* supra (n238) para 27.

<sup>258</sup> *Makwanyane* supra (n56) para 117.

<sup>259</sup> Section 12(1)(c) of the 1996 Constitution.

<sup>260</sup> *Carmichele* supra (n23); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).

<sup>261</sup> *Thebus* supra (n2) para 34.

<sup>262</sup> See MA Rabie 'The Doctrine of Common Purpose in Criminal Law' (1971) 88 *SALJ* 227; MC Mare 'The Doctrine of Common Purpose in South African Law' in JJ Joubert *Essays in honour of S.A Strauss* (1995) 113-33; P Parker 'South Africa and the Common Purpose Rule in Crowd Murders' (1996) 40 *Journal of African Law* 78; M Reddi 'The Doctrine of Common Purpose Receives the Stamp of Approval' (2005) 122 *SALJ* 59; U Kistner 'Common Purpose: The Crowd and the Public' (2015) 26 *Law and Critique* 27.

<sup>263</sup> *Thebus* supra (n2) paras 34, 40.

<sup>264</sup> *Ibid* para 40.



Kantian approach when interpreting the limitation of rights in relation to the importance of crime control:

Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.<sup>266</sup>

In *Manamela*,<sup>267</sup> the CC cited the abovementioned dictum with approval.<sup>268</sup> The CC asserted that “the prevalence of serious crime calls for government action, but does not provide a blank cheque for the legislature to erase all procedural safeguards. Indeed, it is precisely when public emotion is at its highest that procedural protection against possible miscarriage of justice is most necessary”.<sup>269</sup> It is clear that on a Kantian approach, the limitation of rights cannot simply be justified on the importance of crime control alone.

#### 2.8.4.2 *The relation between the limitation and its purpose*

A legitimate limitation of a right necessitates a causal connection between the law and its purpose.<sup>270</sup> In order to establish a causal connection, especially where the justification rests on factual and/or policy considerations, such material must be put before the court.<sup>271</sup> Chaskalson P’s judgment in *Makwanyane* provides a bulwark against the reliance of a utilitarian approach supported by instrumental arguments to establish a causal connection between the limitation and its purpose. Chaskalson P rejected the Attorney-General’s argument that the death penalty served as a vital mechanism for the deterrence, prevention and retribution of violent crimes.<sup>272</sup> The rejection was based on the fact that the Attorney-General’s argument was instrumental, as no evidence was provided to support his

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<sup>265</sup> *S v Dlamini* 1999 7 BCLR 771 (CC).

<sup>266</sup> *Ibid* para 68.

<sup>267</sup> *Manamela* supra (n238).

<sup>268</sup> *Ibid* para 36.

<sup>269</sup> *Ibid* para 37.

<sup>270</sup> *Currie et al op cit* (n66) at 169.

<sup>271</sup> *Ibid* at 154, *S v Meaker* 1998 (8) BCLR 1038 (W) at 1047A-G; *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC) para 19; *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC); *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC); *British American Tobacco South Africa (Pty) Ltd v Minister of Health* (2012) 3 All SA 593 (SCA) para 19-22.

<sup>272</sup> *Makwanyane* supra (n56) para 116-31.

contentions.<sup>273</sup> Moseneke's assertion that the doctrine limits and controls crime, as well as deters violent crimes, mimics that of the Attorney-General's argument in *Makwanyane* – an instrumental argument, aimed at endorsing the doctrine's rational connection to a legitimate objective of crime control.<sup>274</sup>

A court, heeding the Kantian inspired dictum in *Dlamini*, *Manamela* and *Makwanyane*, would require something far greater than a simple cost-benefit instrumental argument as levelled by Moseneke. Aptly, Schwikkard forewarns the tension between instrumental arguments on human rights and criminal law adjudication:

In the area of criminal justice, the justification for limiting rights is inevitably instrumental: the infringement is necessary to meet the pressing social need of combating crime. In order for these instrumental arguments to be clear and compelling they need to be supported by evidence so that their rationality can be tested. The weighting and evaluation of these arguments and the evidence on which they are based need to be placed in the public domain.<sup>275</sup>

Moseneke declares that “absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime”.<sup>276</sup> Moseneke's declaration ignores the caveat in *Makwanyane*, wherein Chaskalson P notes:

In the debate as to the deterrent effect of the death sentence, the issue is sometimes dealt with as if the choice to be made is between the death sentence and the murder going unpunished. That is of course not so. The choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term of imprisonment which, in an appropriate case, could be a sentence of life imprisonment. Both are deterrents, and the question is whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect.<sup>277</sup>

The eradication of the doctrine common purpose from South Africa's law, premised as a fear-inducing proclamation, will not save participants to a common purpose from criminal liability for two essential reasons. First, there is no evidence to intimate Moseneke's premise or prove

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<sup>273</sup> Ibid.

<sup>274</sup> *Thebus* supra (n2) para 34.

<sup>275</sup> Schwikkard op cit (n203) at 294.

<sup>276</sup> *Thebus* supra (n2) para 34.

<sup>277</sup> *Makwanyane* supra (n56) para 123.

the doctrine's effectual prosecution of perpetrators.<sup>278</sup> Dressler notes that "there is no empirical research that directly focuses on the comparative dangerousness of parties to crimes. Statistics pertaining to crime commission, convictions, and recidivism do not distinguish between perpetrators and their assistants, or between types of accomplices".<sup>279</sup> Moseneke's argument supporting the deterrent effect of common purpose implicitness rests on South Africa's minimum sentencing scheme recognising the crimes of murder and rape committed in the furtherance of a common purpose.<sup>280</sup> However, Michael Tonry, one of the foremost international sentencing experts, contends that minimum sentencing schemes do not have any significant effect on the rates of serious crime.<sup>281</sup> Secondly, there are number of alternative, less restrictive means capable of achieving crime control.

#### 2.8.4.3 *Whether there are less restrictive means to achieve the purpose*

The reasonableness and justifiability of the limitation ultimately depend on whether the law invades rights more than is necessary to achieve its purpose.<sup>282</sup> Accordingly, the limitation will be disproportionate if alternative means could achieve the same purpose by either not limiting the rights at all or limiting the rights to a lesser extent.<sup>283</sup> One of the court's most recent decisions presents the balancing of society's interest for crime control with a Kantian interpretation of an individual's rights in light of the less restrictive means factor.

In *Minister of Police and Others v Kunjana*,<sup>284</sup> the CC placed a significant weight on the existence of alternative measures to s 11(1)(a) and (g) of the Drugs and Drug Trafficking Act.<sup>285</sup> Despite Mhlantla J emphasising the importance of the provisions for the achievement of crime control, the CC found the provisions to constitute an infringement of an individual's right to privacy and dignity, the infringement of which was not a reasonable and justifiable limitation, as s 22 of the Criminal Procedure Act<sup>286</sup> served as a less restrictive means. In

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<sup>278</sup> Institute for Security Studies South African Crime Quarterly No 58 Dec 2016; D Bruce 'Public Order Transparency: Using Freedom of Information Laws to Analyse the Policing of Protest' ISS South African Crime Quarterly No. 58 (2016) 23 at 25; Crime Stats South Africa; Africa Check South Africa's 2015/2016 Crime Statistics; Institute for Security Services SA Crime Stats; South African Institute of Race Relations Crime and Security Survey 2014/2015; South African Institute of Race Relations Crime and Security Survey 2014/2015.

<sup>279</sup> J Dressler 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings LJ* 91 at 111-2; Walker op cit (n54) at 92.

<sup>280</sup> Section 51(1) of Act 105 of 1997.

<sup>281</sup> M Tonry 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' (2009) 38 *Crime and Justice: A Review of Research* 65 at 100.

<sup>282</sup> Currie et al op cit (n66) at 171.

<sup>283</sup> Ibid at 170.

<sup>284</sup> *Minister of Police v Kunjana* 2016 ZACC 21.

<sup>285</sup> Drugs and Drug Trafficking Act 140 of 1992.

<sup>286</sup> 51 of 1977.

*Thebus*, Moseneke asserts a similar importance of the purpose of common purpose as Mhlantla J in *Kunjana*. As Moseneke J found that the doctrine did not limit any of the rights asserted by the appellants, the contention on the relative degree of the invasiveness of common purpose in comparison to other forms of liability was not discussed. However, as argued above, the doctrine does infringe a number of rights and an enquiry into less restrictive means is necessary.

The doctrine of common purpose is not the only means of addressing the pressing social need of prosecuting and deterring group, organised or collective misdeeds. Burchell elucidates a number of alternative convictions that would have achieved the deterrent and preventative purpose sought in common purpose cases.<sup>287</sup> The conviction of lesser offences is one such alternative conviction. Burchell submits that in *Safatsa*, the accused could be liable for conspiracy, incitement to commit the other crimes, attempted arson, and/or arson.<sup>288</sup> Furthermore, the second appellant's conviction for treason in *Nzo* could have achieved the desired purpose without the coupling of a conviction of murder.<sup>289</sup> Similarly, in *Thebus*, the appellants could have been convicted of public violence, and the second appellant could have additionally been convicted of attempting to defeat the administration of justice.<sup>290</sup> Parker levels an identical argument to Burchell, noting that in many of the cases of unrest between September 1984 and May 1987, these cases could have been dealt with in terms of the common law crime of public violence and the provisions of the Internal Security Act.<sup>291</sup>

Burchell advocates for the extinction of the doctrine of common purpose, in favor of an additional less restrictive means, namely accomplice liability.<sup>292</sup> His support is based on the fact that the problems associated with the doctrine are primarily caused by the derogation of a causal nexus. Liability based on accomplice liability which necessitates a causal nexus between the assistance of the accomplice and the commission of the offence by the perpetrator,<sup>293</sup> does not have the problems associated with common purpose.<sup>294</sup> Burchell argues that in *Thebus*, where Moseneke J relied on the English joint enterprise rule to support South Africa's doctrine, the support was mistaken,<sup>295</sup> as the English rule does not regard

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<sup>287</sup> Burchell op cit (n51) at 486-488.

<sup>288</sup> Ibid at 487.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> See ss 46-53 of the Internal Security Act 74 of 1982; Parker op cit (n279) at 78.

<sup>292</sup> Burchell op cit (n51) at 487.

<sup>293</sup> *S v Williams* 1980 (1) SA 60 (A) at 176.

<sup>294</sup> *Khoza* supra (n94) at 1013B-F, 1054A-B.

<sup>295</sup> *Thebus* supra (n2) para 22.

participants in a joint enterprise as co-perpetrators by imputing the liability, but regards them as accomplices.<sup>296</sup> Despite Burchell's overwhelming support for the replacement of the doctrine of common purpose with accomplice liability, the law related to accomplice liability is not devoid of problems.<sup>297</sup> However, the problems related to accomplice liability are theoretically due to the lack of development of the related law. This is attributed to the fact that in most instances where accomplice liability is appropriate, the courts have instead applied and developed common purpose.

On a Kantian interpretative approach, the common purpose doctrine violates a number of rights that cannot be justified by the instrumental argument of crime control. Furthermore, the significance placed on less restrictive means and the existence thereof to common purpose intensifies the submission that the doctrine of common purpose unreasonably and unjustifiably limits an accused's rights to dignity, presumption of innocence, freedom and security of person, and equality. Ramraj provides an apt conclusion to the balance that must be struck between the factors comprising the limitation analysis when the limitation of rights is premised on the purpose of crime control:

A high rate of crime is, of course, serious and in some extreme cases may well threaten the very fabric of constitutional rights. However, the prevention of crime, as an admittedly crucial societal goal, is a multifaceted task involving, at the very least, a fair distribution of education, social wealth, self-esteem, and opportunity, which should not – and need not – be achieved at the expense of the morally innocent within the criminal justice system.<sup>298</sup>

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<sup>296</sup> Burchell op cit (n51) at 487.

<sup>297</sup> Ibid at 507 outlines some of the problems associated with accomplice liability, specifically in regard to Joubert JA's definition of accomplice liability in *Williams*. He notes four problems: (a) does 'further or 'assist' imply 'causally contribute' to the commission of the crime; (b) can one further or assist by omission; (c) can a person be an accomplice where he or she has furthered or assisted the commission of the crime by another, but without the latter's knowledge; (d) what degree of accessoriness is required.

<sup>298</sup> Ramraj op cit (n237) at 257.

## 2.9 CONCLUSION

Epitomising Fanon's notion of 'cognitive dissonance', the CC, to protect the core belief that common purpose addresses the social need to control crime, appears to rationalise, ignore and even deny anything that does not fit in with the core belief by disregarding precedent<sup>299</sup> and relying on instrumental arguments.<sup>300</sup> This chapter has shown that the rights to dignity; presumption of innocence; freedom and security of person; and equality, are infringed by the application of the doctrine of common purpose. On a Kantian approach to the interpretation of the limitation of rights, the limitation of these rights is unjustifiable, as the purpose of the limitation, namely crime control, is disproportionate to the infringement of the rights. Furthermore, the existence of less restrictive alternative means of achieving the desired crime control benefits of the doctrine, tips the balance in favour of the finding that the doctrine unreasonably and unjustifiably infringes the aforementioned rights.

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<sup>299</sup> *Mgxwiti* supra (n94); *Zigqolo* supra (n94); *Khoza* supra (n94); *Nzo* supra (n87).

<sup>300</sup> Fanon op cit (n1).

## CHAPTER 3

### THE DOCTRINE OF COMMON PURPOSE AND THE PRINCIPLES OF CRIMINAL LAW

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#### 3.1 INTRODUCTION

This chapter focuses on the relation between the principles of criminal law and the doctrine of common purpose. It commences with a discussion of the doctrine's adherence to the fundamental principle of legality. The *ius certum* principle forms the main focus, as the concept of 'active association' and the defence of dissociation suggest a level of vagueness indicative of a violation of the principle of legality. Thereafter, a close scrutiny follows the court's normative justification for the imputation of causation in common purpose by prior agreement and in its active association form. This chapter then details the problems associated with the assessment of fault in common purpose cases. First, the problems raised by the judgment in *Nkwenja*,<sup>1</sup> which considers the moment *mens rea* is assessed, is elucidated. Secondly, the court's process of inferential reasoning to establish *dolus eventualis* in common purpose cases is scrutinised. The chapter closes with an analysis of the effectiveness of the defences of mistake as to the causal sequence and mistake of law to limit the liability under common purpose.

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<sup>1</sup> *S v Nkwenja* 1985 (2) SA 560 (A).

## 3.2 THE PRINCIPLE OF LEGALITY: VOID FOR VAGUENESS

### 3.2.1 Background

The principle of legality, which forms part of the rule of law, is guaranteed by s 35(3)(l-n) of the Constitution. The principle of legality declares that “punishment may only be inflicted for contraventions of a clearly defined crime created by a law that was in force before the contravention”.<sup>2</sup> The principle of legality encompasses five sub-principles.<sup>3</sup> However, for the purpose of this thesis, only the *ius certum* principle will be scrutinised, as the vagueness of the doctrine of common purpose suggests an inconsistency with this sub-principle.

The *ius certum* principle provides that common-law crimes must be clearly defined. The principle negatively phrased provides that common-law crimes that are vague and unclear undermine the principle of legality.<sup>4</sup> In *Savoi*,<sup>5</sup> detailing the doctrine of vagueness, Madlanga J cites Ngcobo J in *Affordable Medicines*:<sup>6</sup>

The doctrine of vagueness is founded on the rule of law, which...is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity... The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.<sup>7</sup>

Madlanga J and Ngcobo J’s interpretation of the *ius certum* principle mimics the English law principle of maximum certainty<sup>8</sup> and the US void for vagueness principle. The US Supreme Court emphasised “a law which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”.<sup>9</sup> In *Friedman*,<sup>10</sup> Cloete J noted the appellant’s reliance on Canadian cases,<sup>11</sup> wherein the Canadian Supreme Court

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<sup>2</sup> JM Burchell *Principles of Criminal Law* 5<sup>th</sup> Ed (2016) at 35.

<sup>3</sup> For a detailed breakdown of the five sub-principles see Burchell op cit (n3) at 35-46; CR Snyman *Criminal Law* 6<sup>th</sup> Ed (2014) at 35-49; G Kemp *Criminal Law in South Africa* 2<sup>nd</sup> Ed (2015) at 17-19; K Phelps and S Kazee ‘The Constitutional Court gets anal about rape - gender neutrality and the principle of legality in *Masiya v DPP*’ (2007) 20 SACJ 341; W Freedman ‘Constitutional Aspects of Criminal Justice’ (2016) 29 SACJ 207.

<sup>4</sup> Burchell op cit (n3) at 35; Snyman op cit (n4) at 42.

<sup>5</sup> *Savoi v National Director of Public Prosecutions* 2014 (1) SACR 545 (CC).

<sup>6</sup> *Affordable Medicines Trust s v Minister of Health* 2006 (3) SA 247 (CC).

<sup>7</sup> Ibid para 108; quoted in *Savoi* supra (n5) para 16.

<sup>8</sup> *Kokkinakis v Greece* 1994 17 EHRR 397 para 52; *Sunday Times v UK* 1979 2 EHRR 245 para 49; *Hashman and Harrup v UK* 2000 30 EHRR 241; A Ashworth & J Horder *Principles of Criminal law* 7<sup>th</sup> Ed (2013) at 63.

<sup>9</sup> *Conally v General Construction Co* 1926 269 US 385 at 391; Ashworth op cit (n8) at 65.

<sup>10</sup> *S v Friedman* 1996 (1) SACR 181 (W).

<sup>11</sup> *R v Nova Scotia Pharmaceutical Society* 1992 2 S.C.R. 606; *R v Butler* 1992 8 C.R.R. (2d) 1.



considered vagueness by addressing two issues: (i) is the law so vague that it does not qualify as “a limit prescribed by law” –the test is whether the law provides “an intelligible standard according to which the judiciary must do its work”; and (ii) is it so imprecise that it is not a reasonable limit?

It is submitted that the doctrine of common purpose, specifically the requirement of active association and the concept of dissociation, violates the *ius certum* principle, as both the requirement of active association and concept of dissociation fail to elucidate what is required with reasonable certainty. The ensuing chapter details the requirement of active association and the concept of dissociation, noting the court’s vague interpretation and the vacillating application thereof.

### 3.2.2 ‘Active association’

The doctrine of common purpose in the form of active association violates the principle of legality, as the requirement of ‘active association’ is inherently vague.<sup>12</sup> Despite the existence of the *Mgedezi* requirements that establish active association, the development of the requirement of active association evinces the courts’ continuous inconsistent application of the factors that constitute the establishment of a participant’s active association in the common purpose.

In *Williams*,<sup>13</sup> the AD distinguished between a perpetrator and an accomplice, whereby the concepts of “association” and “help” were likened with the role of an accomplice.<sup>14</sup> However, these concepts were not defined by the AD.<sup>15</sup> In *Khoza*,<sup>16</sup> Botha AJA latched on to the undefined concept of association mentioned in *Williams*, whereby his minority judgment introduced the notion of replacing the causal requirement with the concept of actively associating with the commission of the common purpose.<sup>17</sup> Six years later, Botha JA in *Safatsa*,<sup>18</sup> expanded on his minority judgment in *Khoza*. The requirement of a causal nexus was replaced with the requirement of ‘active association’. However, Botha JA failed to detail the concept of ‘active association’ in *Safatsa*, merely confirming that a causal nexus was not

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<sup>12</sup> Burchell op cit (n2) at 488.

<sup>13</sup> *S v Williams* 1980 (1) SA 60 (A).

<sup>14</sup> Ibid.

<sup>15</sup> P Parker ‘South Africa and the Common Purpose Rule in Crowd Murders (1996) 40 *Journal of African Law* 78 at 95 submits that the words ‘associate’ and ‘help’ were not defined, thus obfuscating the distinction between associate, help, encourage, aid, abet, counsel or procure.

<sup>16</sup> *S v Khoza* 1982 (3) SA 1019 (A).

<sup>17</sup> Ibid 1052E-G.

<sup>18</sup> *S v Safatsa* 1988 (1) SA 868 (A).

required. Botha JA professed the vagueness of the concept of ‘active association’ and justified its usage by comparing it with the potential vagueness of psychological causation:

[T]he adherence to the requirement of a causal connection between the conduct of the latter person and the death of the deceased would necessitate stretching the concept of causation, inter alia by resorting to the device of ‘psychological causation’, to such unrealistic limits as to border on absurdity. *In the process there would be present a greater measure of vagueness and uncertainty than in regard to the application of the test of active association with the attainment of the common purpose.* In any event, I do not think that the application of the latter tests presents unmanageable problems.<sup>19</sup>

Botha JA’s justification was later criticised in the academic condemnation that followed the *Safatsa* judgment.<sup>20</sup> Nevertheless, one year later in *Mgedezi*,<sup>21</sup> Botha JA infused the decision in *Safatsa* with Professor Whiting’s active association requirements,<sup>22</sup> thus entrenching the doctrine of common purpose by active association into South African law. The requirements of the doctrine of common purpose by active association, or the *Mgedezi* requirements as referred to in subsequent case law, have been constitutionally endorsed in *Thebus*.<sup>23</sup>

The CC has asserted that the establishment of active association depends on the satisfaction of the factual context of each case to the *Mgedezi* requirements.<sup>24</sup> These may provide a rebuttal against the argument that active association is vague. However, this rebuttal is baseless for two reasons. First, one of the *Mgedezi* requirements, specifically the manifestation of a sharing of a common purpose (the fourth *Mgedezi* requirement) fails to indicate with reasonable certainty what is required of a participant to actively associate with the commission of the crime. It is submitted that the highly criticised judgments of *Safatsa*, *Nzo*, and *Thebus* may be partly attributed to the vagueness of the fourth *Mgedezi* requirement.

In *Safatsa*, accused 4 encouraged the crowd by shouting that the Deputy Mayor should be killed and slapped another woman who attempted to intercede for the deceased Deputy Mayor. Similar to Cameron’s<sup>25</sup> contentions, there was no proof indicating that accused 4 manifested a sharing of a common purpose, as her conduct could not be deemed to be in

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<sup>19</sup> Ibid 901B-E (emphasis added).

<sup>20</sup> E Cameron ‘Inferential Reasoning and Extenuation in the case of the Sharpeville Six’ (1998) 2 *SACJ* 243; VVW Duba ‘What was wrong with the Sharpeville Six decision?’ (1990) 2 *SACJ* 180; E Cameron ‘When Judges Fail Justice’ (2004) 121 *SALJ* 580.

<sup>21</sup> *S v Mgedezi* 1989 (1) SA 687 (A).

<sup>22</sup> R Whiting ‘Joining in’ (1986) 103 *SALJ* 38; see the preface for a breakdown of these requirements (page 2).

<sup>23</sup> *Thebus v S* 2003 (6) SA 505 (CC).

<sup>24</sup> Ibid para 45 (emphasis added).

<sup>25</sup> Cameron (2004) op cit (n20) at 582.

association with the conduct of those who killed the Deputy Mayor.<sup>26</sup> Cameron submits that accused 4's conduct could not even be said to have incited or instigated or encouraged the deeds of the actual killers, thus satisfaction of the fourth *Mgedezi* requirement is implausible.<sup>27</sup> Nevertheless, the court, given the unrestricted freedom to interpret the factual scenario afforded by the vagueness of the fourth *Mgedezi* requirement, convicted accused 4 of murder. Sisilana argues that the phrase "conduct of others" in the fourth *Mgedezi* requirement is especially vague, as the conduct may refer to anything that the other accused did or conduct that forms the conduct element of the crime charged.<sup>28</sup> On the latter interpretation, accused no 7's conduct did not constitute an act of association, as his conduct was not consistent with murder.<sup>29</sup>

Similarly, Burchell criticises the judgment in *Thebus* on the basis that active association was not proven. Burchell submits that the court in *Thebus* sacrificed legal principles in favour of crime control. He argues:

On the evidence in *Thebus*, joining the protesting group and either carrying a pick handle (if appellant 1's alibi is rejected) or holding a gun (but not witnessed shooting it) and collecting spent cartridges after the shots have been fired, is not sufficient active association to render the appellants *co-perpetrators* in the murder of an innocent bystander.<sup>30</sup>

Once again, the ill-defined fourth *Mgedezi* requirement allowed the court to interpret the evidence in such a way that even in the absence of evidence, the fourth *Mgedezi* requirement could be satisfied. The judgment in *Nzo* evinces another chilling instance where the vagueness of the *Mgedezi* requirements was abused.

In *Nzo*, there was no evidence that the appellants, although being active members in the campaign of the ANC, manifested a sharing of a common purpose with Joe's conduct of murdering Mrs T. The unrestricted freedom to interpret the factual scenario so as to satisfy the *Mgedezi* requirements permitted Hefer JA to reject the appellants' argument, holding:

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<sup>26</sup> L Sisilana 'What's Wrong with Common Purpose' (1999) 12 *SACJ* 287 303-7.

<sup>27</sup> Cameron (2004) op cit (n20) at 582.

<sup>28</sup> Ibid Sisilana op cit (n26) at 303.

<sup>29</sup> Ibid. Accused no 7's conduct comprised of: making petrol bombs; been part of the crowd throwing stones at the deceased's house; setting the deceased's house alight; and pushing the deceased car out onto the street.

<sup>30</sup> Burchell op cit (n2) at 486.

Their design was to wage a localised campaign of terror and destruction; and it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed.<sup>31</sup>

Hefer JA noted further that “there is no logical distinction between a common design relating to a particular offence and one relating to a series of offences”.<sup>32</sup> Steyn JA’s dissenting judgment must be noted, as it acknowledges the wide ambit of common purpose amplified by the vagueness of the *Mgedezi* requirements. Steyn JA held that a broad, overarching common purpose to commit sabotage cannot warrant a conviction for murder.<sup>33</sup> Burchell’s criticism of the judgment cogently captures the problem with the *Mgedezi* requirements and the application thereof:

According to the prerequisites laid down by Botha JA in *Mgedezi*, presence at the scene of the killing would be required for the common-purpose principle, of imputing the acts of the perpetrator to the other parties to the common purpose, to apply. However, in *Nzo*, neither the first nor the second appellant was proved to be present when Joe killed the deceased. Furthermore, the conclusion reached by Hefer JA that the common-purpose principle can be invoked against the second appellant in order to find him guilty of murder, runs contrary to two further requirements laid down by Botha JA in *Mgedezi*. There was insufficient evidence to draw an inference of an intention on the part of the second appellant (or the first appellant, for that matter) to make common cause ‘with those who were actually perpetrating the assault’ and there was no manifestation of a sharing of a common purpose with the perpetrator of the murder by performing ‘some act of association’ with the conduct of the murderer.<sup>34</sup>

The criticism levelled by Burchell brings to light the devastating effects that the vague *Mgedezi* requirements can have when a court enjoys the unfettered interpretative freedom to establish a participant’s active association.<sup>35</sup> However, advocates of the doctrine rely on Alkema J’s judgment in *Mzwempi*,<sup>36</sup> wherein the meaning of the fourth *Mgedezi* requirement was elucidated, to clarify the vagueness of the requirement.

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<sup>31</sup> *S v Nzo* 1990 (3) SA 1 (A) at 7I-J.

<sup>32</sup> *Ibid* at 8G-H.

<sup>33</sup> *Ibid* at 16C.

<sup>34</sup> J Burchell ‘*S v Nzo* 1990 (3) SA 1 (A) Common-Purpose Liability’ (1990) 3 *SACJ* 345 at 348-9.

<sup>35</sup> Burchell’s criticism on the application of the *Mgedezi* requirements in *Nzo* is correct, barring one error. Burchell argues that one of the *Mgedezi* requirements, namely, presence at the scene of the killing, was not satisfied. However, Burchell fails to give effect to the earlier AD judgment in *S v Yelani* 1989 (2) SA 43 (A), where the requirement of presence at the scene was held to be nonobligatory.

<sup>36</sup> *S v Mzwempi* 2011 (2) SACR 237 (ECM).

Alkema J held that the conduct referred to in the fourth *Mgedezi* requirement is restricted to particular conduct and not to any conduct.<sup>37</sup> Alkema J noted that in the judgments of *Safatsa*, *Mgedezi*, *Nzo* and *Thebus*, the court interpreted the conduct in the fourth *Mgedezi* requirement as conduct that caused the ultimate unlawful consequence.<sup>38</sup> However, Alkema J's submission ignores the aforementioned academic criticism levelled against these judgments, whereby even on Alkema J's interpretation of the conduct referred to in the fourth *Mgedezi* requirement, the requirement is not satisfied.

The second rebuttal against the claim that the existence of the *Mgedezi* requirements negatives the vagueness of active association rests on the qualifications that have undergone common purpose by active association both pre- and post-*Thebus*' Constitutional endorsement. Courts have vacillated between the factors that constitute active association. One such factor is the presence at the scene of the commission of the crime, where the AD in *Yelani*,<sup>39</sup> per Smalberger JA, qualified one of the *Mgedezi* requirements, holding that presence at the scene where the commission of the crime took place was not an immutable requirement for liability under the common purpose doctrine. In *Sibeko*,<sup>40</sup> the SCA stated that "the fact that the appellants had run away leaving their colleague behind did not absolve them from blameworthiness".<sup>41</sup> In *Petersen*,<sup>42</sup> the AD asserted that association with the common purpose can be established by an accused's act after the death of the victim. Furthermore, the court held that an accused's act after the death of the victim can be used as an inference of the accused's intention in the form of *dolus eventualis*.<sup>43</sup> However, in *Mbanyaru*,<sup>44</sup> the full bench of the Cape High Court failed to consider the AD's extension of common purpose in *Petersen*, holding that the second appellant's act of running away with the first appellant after the fatal shooting cannot be inferred as constituting an 'active association'.<sup>45</sup>

The SCA's judgment in *Dewnath*<sup>46</sup> attempted to detail the proper application of the *Mgedezi* requirements, holding (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be

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<sup>37</sup> Ibid para 56.

<sup>38</sup> Ibid paras 60, 61, 69, 73.

<sup>39</sup> *Yelani* supra (n35).

<sup>40</sup> *S v Sibeko* 2004 (2) SACR 22 (SCA).

<sup>41</sup> M Reddi 'General Principles' (2004) 17 *SACJ* 406 at 408.

<sup>42</sup> *S v Petersen* 1989 (3) SA 420 (A).

<sup>43</sup> Ibid; confirmed in *S v Majosi* 1991 (2) SACR 532 (A).

<sup>44</sup> *S v Mbanyaru* 2009 (1) SACR 631 (C).

<sup>45</sup> Ibid paras 15-6; S Hoctor 'General principles and specific crimes' (2009) 2 *SACJ* 246.

<sup>46</sup> *Dewnath v S* 2014 ZASCA 57.

significant and not a limited participation removed from the actual execution of the crime.<sup>47</sup> The judgment, although arguably seeking to correct the vagueness of the requirement of active association, falls victim to the very thing they are seeking to rectify. The SCA failed to accurately define both qualifications to the *Mgedezi* requirements. Furthermore, the SCA's judgment failed to juxtapose the *Dewnath* qualifications with the developments of the *Mgedezi* requirements. One such juxtaposition relates to the judgment in *Yelani*. It remains unclear whether the non-obligatory *Mgedezi* requirement of presence at the scene could satisfy the *Dewnath* qualifications, as it hardly seems likely that a participant who is not present on the scene can be considered to have actively associated to a significant extent and the participant's conduct to be in close proximity with the result.

Moseneke J's assertion that the requirement of active association depends on the facts of each case delineates the inherent vagueness of the requirement, even when interpreted by South Africa's highest court.<sup>48</sup> The development of the requirement illustrates the unreasonableness and impossibility expected of a participant to understand, appreciate and direct his actions towards the realisation of actively associating in the common purpose. A participant's understanding and appreciation are only seemingly determined after a court interprets the factual scenario, whereby the vagueness of the court's interpretation has the possible counter-effect of exacerbating the participant's and future participant's lack of understanding and appreciation. Despite the CC confirming the *Mgedezi* requirements in *Thebus*, the developments thereof are ignored. Thus, it is uncertain whether the requirement of presence at the scene as necessitated in *Mgedezi*, or rendered non-obligatory as in *Yelani*, represents the current law pertaining to active association. Furthermore, the SCA's failure to accurately define the *Dewnath* qualifications exacerbates the confusion when juxtaposing the qualifications with the developments of the *Mgedezi* requirements. In effect, a court would enjoy the freedom to interpret the factual scenario in light of the *Dewnath* qualifications in a way that appropriates crime control.

Advocates of the doctrine of common purpose would argue that the concept of dissociation serves as a reasonable limit of the requirement of active association, thus negating the imprecision of the doctrine. However, the defence of dissociation manifests a similar vagueness to the requirement of active association.

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<sup>47</sup> Ibid paras 15-16.

<sup>48</sup> *Thebus* supra (n23) para 45.

### 3.2.3 Dissociation from a common purpose

Dissociation from a common purpose negates the accused's participation in a common purpose. However, the development of dissociation and its present articulation manifests a similar vagueness to the aforementioned requirement of active association. In order to ascertain the current law on dissociation, a reflection of the development of the defence is necessary. The reflection captures Snyman's commentary on the matter, whereby "South African courts have not yet developed very specific rules relating to the circumstances in which withdrawal will effectively terminate a participant's liability".<sup>49</sup> The development of the defence, coupled with Snyman's postulations on the matter, supports the submission that the vagueness of the defence may translate into an obfuscating attempt to dissociate from a common purpose.

In *Chinyerere*,<sup>50</sup> Lewis JP held that a conspirator can withdraw from the joint enterprise at the last moment and the conspirator must merely attempt to frustrate the plan. However, in *Ndebu*,<sup>51</sup> the court submitted that an effective dissociation entails the accused informing his companions of a change in intent and an attempt to change the intent of the companions. In *Nomakhlala*,<sup>52</sup> the AD, per Grosskopf JA, asserted that the State must prove that the accused persisted in the execution of the common purpose. Accordingly, the court held that the accused's withdrawal from the scene of the crime, coupled with his refusal to comply with an instruction to stab the deceased amounted to an effective dissociation from the common purpose.<sup>53</sup> The fact that the accused was unaware of the true intention of the actual perpetrators bolstered his defence of dissociation.<sup>54</sup>

In *Nzo*,<sup>55</sup> the AD accepted the first appellant's defence of dissociation, as he voluntarily disclosed his and his colleagues' involvement in ANC activities before the murder was committed. In *Beahan*,<sup>56</sup> Gubbay CJ described the rule of dissociation:

Where a person has merely conspired with others to commit a crime but has not commenced an overt act towards the successful completion of that crime, a withdrawal is effective upon

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<sup>49</sup> Snyman op cit (n3) at 263.

<sup>50</sup> *R v Chinyerere* 1980 (2) SA 576 (RA).

<sup>51</sup> *S v Ndebu* 1986 (2) SA 133 (ZS).

<sup>52</sup> *S v Nomakhlala* 1990 (1) SACR 300 (A); DR Khuluse 'Dissociation from common purpose- a survey' (1992) 5 *SACJ* 173 at 175.

<sup>53</sup> *Nomakhlala* supra (n52) at 303-4.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Nzo* supra (n31).

<sup>56</sup> *S v Beahan* 1992 (1) SACR 307 (ZS); SK Parmanand & MS Ramaite 'Dissociation from a common purpose' (1994) 1 *Stellenbosch LR* 82.

timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required.<sup>57</sup>

In *Singo*,<sup>58</sup> Grosskopf JA detailed the tests to be applied for an accused to effectively dissociate from the common purpose. The court distinguished the aforementioned South African and Zimbabwean authority as it pertained to common purpose by prior agreement. Accordingly, Grosskopf JA, stressing the requirements for liability, being intention and an active association with the conduct of the others for the attainment of the common purpose, held that effective dissociation depends on either of the above requirements being unfulfilled.<sup>59</sup> The court expounded on the test for dissociation, stating:

The test for dissociation will often be difficult to apply, but ultimately it is a question of fact and evidence. The accused starts with the problem that, *ex hypothesi*, he was an active participant in the common purpose, and a court may well be skeptical of his avowal of abjuration. Nevertheless here, as elsewhere, the *onus* is on the prosecution.<sup>60</sup>

Grosskopf JA noted further that the accused's change in intent is not dependent on moral considerations, but purely a factual inquiry.<sup>61</sup> The accused's withdrawal from the scene after being injured himself would factor into the factual inquiry. Furthermore, it is not decisive that the accused communicated his change in intent.<sup>62</sup> The evidentiary accumulation of the factual inquiry led the court to conclude that the accused effectively dissociated from the common purpose.

In *Nduli*,<sup>63</sup> Nienaber JA neither relied on Gubbay CJ's dictum in *Beahan* nor confirmed it as a rule of South African law. Instead, the Court held that despite the accused's lack of presence at the scene of the crime, the fact that the accused was a party to the planning of the robbery, coupled with his conduct of being a lookout, accompanying the robbers and knowing that weapons would be taken along and might be used, the defence of dissociation

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<sup>57</sup> *Beahan* supra (n56) at 324b-c.

<sup>58</sup> *S v Singo* 1993 (1) SACR 226 (A); Andrew Paizes 'Common purpose by active association: some questions and some difficult choices' (1995) 112 *SALJ* 561.

<sup>59</sup> *Singo* supra (n58) at 232.

<sup>60</sup> *Ibid* at 233.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*.

<sup>63</sup> *S v Nduli* 1993 (2) SACR 501 (A).



was rejected.<sup>64</sup> Furthermore, Nienaber JA relied on the judgments of *Petersen*<sup>65</sup> and *Majosi*,<sup>66</sup> whereby the accused's "conduct after the robbery showed that he remained a willing participant in their joint venture".<sup>67</sup>

In *Musingadi*,<sup>68</sup> Comrie AJA asserted that whether an act constitutes an effective dissociation depends on: the manner and degree of an accused's participation; how far the commission of the crime has proceeded; the manner and timing of disengagement; and in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. Furthermore, Comrie AJA introduced the notion of likening dissociation with the *omissio per commissionem* principle.<sup>69</sup> The court concluded:

The authorities<sup>70</sup> indicate, in my view, that on a practical level the courts of several countries, including South Africa, proceed from this premise: That the greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.<sup>71</sup>

Comrie AJA argues that the defence of dissociation should not be reduced to a rule of law, as the factors constituting an effective dissociation are not exhaustive. Comrie AJA's argument directly feeds into the problem underlying the defence of dissociation. The lack of a credible, well-defined concept of dissociation inhibits a participant's attempt to dissociate from the common purpose. Snyman articulates the factors that favour a defence of dissociation, but the factors are so vaguely defined that an accused who adamantly seeks to negative liability, may still be held liable. First, a participant must have a clear intention to dissociate from the common purpose or not actively associate in the common purpose.<sup>72</sup> However, a participant's ability to not actively associate, and thus constitute a defence of dissociation, is severely limited by the inherent vagueness of the requirement of active association discussed above.

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<sup>64</sup> Ibid at 507.

<sup>65</sup> *Petersen* supra (n42).

<sup>66</sup> *Majosi* supra (n43).

<sup>67</sup> *Nduli* supra (n63) at 506.

<sup>68</sup> *S v Musingadi* 2005 (1) SACR 395 (SCA).

<sup>69</sup> Ibid para 41; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *S v A en 'n Ander* 1993 (1) SACR 600 (A).

<sup>70</sup> David Lanham 'Accomplices and Withdrawal' (1981) 97 *LQR* 575 at 591; *White v Ridley* (1978) 140 CLR 342; *R v Becerra and Cooper* (1976) 62 Cr App R 212 (CA); *R v Grundy* [1977] *Criminal Law Review* 543 (CA); Smith & Hogan *Criminal Law* 8th ed (1996) at 158-60; Snyman *Strafreg* 4th ed (2005) at 267-9; *Beahan* supra (n56).

<sup>71</sup> *Musingadi* supra (n68) para 39 (emphasis added).

<sup>72</sup> *Singo* supra (n58) at 772H-I.

Secondly, the participant must perform some positive act of dissociation. The positive act has been interpreted as: a communication of dissociation that may or may not need to dissuade the other participants;<sup>73</sup> frustrating the commission of the crime;<sup>74</sup> leaving the presence of the crime.<sup>75</sup> The extent of the participant's positive act depends on the participant's role in the common purpose. A participant who is heavily involved in the common purpose must exhibit some positive act beyond that required of a less involved participant. In effect, a participant, whether heavily involved in the common purpose or not, may never truly appreciate whether his actions constitute an effective dissociation, until the court provides an armchair subjective value judgment of the jurisprudential interpretation of dissociation.<sup>76</sup>

### 3.2.4 Conclusion

A counter argument against the ill-defined requirement of active association and the defence of dissociation would rely on Madlanga J's judgment in *Savoi*. Madlanga J considered the doctrine of vagueness from the perspective of knowledge of unlawfulness, as explicated by the AD in *De Blom*.<sup>77</sup>

A person only acts *dolo malo* when he acts unlawfully with full knowledge that he is doing so. This does not mean the wrongdoer must know that he is contravening section W of Act X of 19YZ, or that the wrongdoer must know that what he intends doing is punishable with this or that punishment, but only that he must be aware of the fact that what he intends doing is unlawful. This does also not mean that the wrongdoer must know for sure that what he intends doing is unlawful, but only that he must have realised that what he intends doing could possibly be unlawful and that he has reconciled himself with this possibility.<sup>78</sup>

The doctrine of vagueness assessed in the context of knowledge of unlawfulness coincides with the thin-ice principle of English law. The thin-ice principle, introduced by Lord Morris,<sup>79</sup> holds that "citizens who know that their conduct is on the borderline of illegality take the risk that their behaviour will be held to be criminal".<sup>80</sup> Ashworth rejects the thin-ice

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<sup>73</sup> *S v Ndebu* 1986 (2) SA 133 (ZS) at 137C.

<sup>74</sup> *S v Chinyerere* 1980 (2) SA 576 (RA) at 579G-H; *Beahan* supra (n56) at 322d; *Singo* supra (n58) at 722.

<sup>75</sup> *Singo* supra (n58).

<sup>76</sup> This differs to other defences, such as private defense of person, whereby a clear set of guidelines are detailed.

<sup>77</sup> *S v De Blom* 1977 (3) SA 513 (A).

<sup>78</sup> Ibid at 530A-B; quoted in *Savoi* supra (n5) para 20.

<sup>79</sup> *Knüller v DPP* 1973 AC 435.

<sup>80</sup> Ashworth op cit (n8) at 62; J Gardner 'Introduction' in HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* 2<sup>nd</sup> Ed (2008) at 36.

principle, as it violates the principle of autonomy, and punishes and stigmatises individuals for conduct unclearly defined.<sup>81</sup>

An application of the test applied for the requirement of active association and the defence of dissociation to the Canadian Supreme Court's prescribed test for vague laws reinforces the claim of vagueness. The requirement of active association and the defence of dissociation requires the judiciary to "do the work" of interpreting whether the conduct of the participant constitutes active association and whether the dissociation constitutes effective dissociation.<sup>82</sup>

The determination of active association upon the factual context of each case, coupled with the vacillating judgments means that the doctrine is so imprecise that it fails to set a reasonable limit.<sup>83</sup> The limit is arguably achieved by the availability of the defence of dissociation, but the court's freedom to make a value judgment pertaining to the defence ultimately entails that a participant may only understand and appreciate his conduct upon an *ex post facto* interpretation by the court.

Snyman concludes that the current propositions on dissociation "are a fair reflection of our law on this subject".<sup>84</sup> Perhaps Snyman is correct, as our law on this subject, namely common purpose in its active association form, reflects the vagueness of the defence of dissociation – laws that fail to indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.

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<sup>81</sup> Ibid.

<sup>82</sup> Supra notes 7-11.

<sup>83</sup> Ibid.

<sup>84</sup> Snyman op cit (n3) at 263.

### 3.3 A NORMATIVE ASSESSMENT OF THE DOCTRINE'S DEROGATION OF A CAUSAL NEXUS

#### 3.3.1 Introduction

The development of the causation requirement in common purpose cases presents two distinct justifications for the imputation of causation in cases of common purpose by prior agreement and in its active association form respectively, namely: mandate and the fulfilment of the *Mgedezi* requirements.<sup>85</sup> This chapter is aimed at assessing the court's two distinct normative justifications for the imputation of causation. First, the mandate justification is scrutinised against the three approaches it encompasses: mandate as authorisation; mandate as power of control and; mandate as contributory cause. Thereafter, this chapter challenges the satisfaction of the *Mgedezi* requirements as a justification for the imputation of causation in common purpose in its active association form. The challenge focuses on the vagueness of the *Mgedezi* requirements, specifically the fourth *Mgedezi* requirement, as well as the significance the court attaches to the collective mind or entity. This thesis reveals that the two distinct normative justifications do not constitute an unassailable basis for the imputation of causation, especially in light of the constitutional violation that ensues therefrom. Thus, the only remaining possible justification for the imputation of causation is the utilitarian rationale of crime control.

#### 3.3.2 Normative justifications

Roman-Dutch law founded liability for participation in a crime on the concept of mandate, which was premised on the maxim '*qui facit per alium facit per se*'.<sup>86</sup> Rabie contends that the concept of mandate refers to quasi-mandate, as an unlawful mandate is not valid.<sup>87</sup> The Transvaal Supreme Court's reference to the term '*socius criminis*' in *Peerkhan and Lalloo* supports Rabie's contention, as the term suggests the mandate arising from the operation of law, rather than from authorisation.<sup>88</sup> The introduction of English law, and its importation of the doctrine of common purpose through the Native Territories Penal Code seemingly saw a change in rationale for culpability. However, Innes CJ's minority judgment in *McKenzie*

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<sup>85</sup> See chapter 1.2 on the development of common purpose and the non-essentiality of a causal nexus.

<sup>86</sup> MA Rabie 'The Doctrine of Common Purpose in Criminal Law' (1971) 88 *SALJ* 227 at 237; A Mattheus *De Criminibus* 1.3.26.7; A Domanski 'Criminal liability based on mandate and order in the *De Criminibus* of Mattheus' (1997) 10 *SACJ* 287.

<sup>87</sup> Rabie op cit (n86).

<sup>88</sup> *R v Peerkhan and Lalloo* 1908 TS 798 at 802.

recognised the doctrine as being premised on the doctrine of implied mandate.<sup>89</sup>

Grounding the imputation of causation of common purpose by prior agreement on the principles of implied mandate remained the underlying justification, but throughout the development of common purpose by prior agreement, courts had failed to assess the rationale.<sup>90</sup>

The development of common purpose led to its extension to include the distinct form of ‘active association’. This distinct form of common purpose did not involve an agreement, nullifying the possible justification grounded in the notion of implied mandate. Botha JA’s judgment in *Safatsa*, wherein the distinct form of common purpose by ‘active association’ was formulated, considered the justification for the imputation of causation, holding that “the much maligned notion of implied mandate seems to me not to be without merit”.<sup>91</sup>

Similarly, the development of common purpose in its active association form bore no reference to a normative justification for the imputation of causation. The CC in *Thebus* however, professed two rationales for common purpose. The first rationale was founded on the object to “criminalise collective criminal conduct and thus to satisfy the social need to control crime committed in the course of joint enterprises”.<sup>92</sup> Secondly, the imputation of causation was premised on the notion that the requirement of causation would “render the object of the doctrine nugatory and ineffectual and make prosecution of collaborative criminal enterprise intractable and ineffectual”.<sup>93</sup> Evidently, the CC failed to provide a normative justification for the imputation of causation, instead favouring an instrumental utilitarian justification of crime control.<sup>94</sup>

Drawing heavily on the works of Lwandile Sisilana<sup>95</sup> and David Unterhalter,<sup>96</sup> who provide the foremost normative critique against the doctrine, this thesis will scrutinise the notion of

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<sup>89</sup> *McKenzie v Van der Merwe* 1917 AD 41 at 46.

<sup>90</sup> *R v Duma* 1945 AD 410 at 415; *R v Mkhize* 1946 AD 197 at 205-6; *R v Shezi* 1948 (2) SA 119 (AD) at 128; *R v Mgxititi* 1954 (10) SA 370 (A) at 382; *R v Bergstedt* 1955 (4) SA 186 (AD) at 188; *R v Motaung* 1961 (2) SA 209 (AD) 210-1; *S v Nkomo* 1966 (1) SA 831 (AD) 833-4; EM Burchell ‘Mandate to Kill by Witchcraft’ (1957) 74 SALJ 382.

<sup>91</sup> *Safatsa* supra (n18) at 900I-901E.

<sup>92</sup> *Thebus* supra (n23) para 34.

<sup>93</sup> *Ibid* para 40.

<sup>94</sup> Moseneke J’s instrumental utilitarian arguments in *Thebus* are scrutinised in chapters 2.8.4.1 and 2.8.4.2.

<sup>95</sup> Sisilana op cit (n26).

<sup>96</sup> D Unterhalter ‘The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?’ (1988) 105 SALJ 671.

implied mandate as a justification for the imputation of causation in common purpose by prior agreement cases. Thereafter, the normative rationale underlying the distinct form of common purpose by active association will be challenged.

The doctrine of causation does not provide a normative justification for attributing liability for the acts of another,<sup>97</sup> as Unterhalter argues:

This limitation is integral to the criminal law's respect for persons as sovereign actors whose volitional action is freely chosen and not determined. When B acts as he does, the criminal law must treat that action as chosen by B, and therefore as B's action alone, or it fails to respect him as a sovereign person. The doctrine of causation cannot make A liable for the volitional action of B, because as Hart and Honore have pointed out, B's chosen action is a barrier through which the causal inquiry cannot penetrate.<sup>98</sup>

The doctrine of common purpose however, allows for the attribution of liability for the acts of another. The imputation of causation from the principal perpetrator to the participants in the common purpose gives effect to this attribution of liability. Thus, a normative justification for the imputation of causation is necessary. Snyman submits that the basis of the doctrine lies in the concept of implied mandate.<sup>99</sup> Walker argues that the notion of implied mandate encompasses three distinct approaches, namely: mandate as authorisation; mandate as power of control; and mandate as contributory cause, which may distinctly afford a normative justification for the imputation of causation.<sup>100</sup>

Mandate as authorisation entails the participant in a common purpose expressly or tacitly authorising the principal perpetrator's unlawful conduct.<sup>101</sup> Mandate as power of control considers the power of control that the participant exercises over the principal perpetrator's conduct.<sup>102</sup> Thus, mandate as authorisation and mandate as power of control are not distinct, as they are both derivatives of the notion of implied perpetration, which is expressed in the '*per alium*' maxim.<sup>103</sup> Unterhalter supports the imputation of causation being based on

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<sup>97</sup> Ibid at 673-674; Unterhalter notes that causation does provide this basis in instances where one person causes harm through an innocent or irresponsible agent.

<sup>98</sup> Ibid at 673; HLA Hart & AM Honore *Causation in the Law* (1959) at 336-7.

<sup>99</sup> Snyman op cit (n3) at 258; *Mgxwiti* supra (n90) at 382; *Motaung* supra (n90); *S v Robinson* 1968 1 SA 666 (A) at 673D-F; *S v Talane* 1986 3 SA 196 (A); *S v Mitchell* 1992 1 SACR 17 (A) at 23.

<sup>100</sup> SA Walker A *Critical Evaluation of the Doctrine of Common Purpose in South African Law* (unpublished LLM thesis, University of KwaZulu-Natal, 2013) at 78.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid at 79.

<sup>103</sup> The '*per alium*' maxim has long been recognised as an acceptable principle of normative justice. Unterhalter op cit (n96) at 673 submits that "this follows from the criminal law's commitment to the idea that he who

mandate as authorisation and as power of control, principally in instances whereby an individual consents to be bound by the actions of another, arguing:

One person is only responsible for the actions of another if he plainly adopts them as his own. Adoption must be informed choice over which the individual has control; it is this consent to be bound that links another's actions to the sovereign will of the individual for which he may justifiably be held accountable... Thus I submit that, save where the individual consents to be bound, there is no basis for attributing the actions of one person to another consistent with the respect the law affords the separateness of persons.<sup>104</sup>

Mandate as authorisation and mandate as power of control may provide a normative justification for the imputation of causation, however, this justification is assailable for two reasons. First, mandate as authorisation and as power of control cannot justify the application of common purpose by prior agreement where that agreement is implied.<sup>105</sup> Sisilana argues:

[I]n so voluntarily assuming each others' conduct, we have exercised our *autonomy*. And if that is the case – if agreement is predicated on autonomy – then that is reason enough to think common purpose by agreement perfectly acceptable... It could however, be argued that agreement is not, in se, sufficient for criminal liability, for there is an important principle of which common purpose by agreement falls foul – the principle of causation. So that if we are to say that agreement is sufficient for the purposes of liability, there must be a characteristic in virtue of which it is superior to the principle of causation.<sup>106</sup>

Sisilana submits that agreement acts as a connection between the participant and the ultimate unlawful consequence, but this connection “is not a causal one: it is one of aligning oneself with the act that causes the prohibited consequence”.<sup>107</sup> Furthermore, agreement does not constitute a strong enough connection, as Sisilana holds that the actual basis for the imputation of causation is both agreement and foresight.<sup>108</sup> Sisilana utilises an example to support his submission: parties agree to rob a bank, and not to kill anybody in the process, but the parties do foresee (without discussion thereof) that one of the members of the party, who is armed might, on resistance, shoot and kill the resisting person. In this example, on the application of common purpose, the parties would be liable for murder. Sisilana validly asks:

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proposes should suffer the same criminal liability as he who disposes because of the moral equivalence of their blameworthiness.”

<sup>104</sup> Ibid at 674.

<sup>105</sup> Walker op cit (n100) at 79-80.

<sup>106</sup> Sisilana op cit (n26) at 290.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid at 288.

“what do we make of the fact that killing doesn’t form part of what was agreed upon?”<sup>109</sup> He argues that foresight is not reducible to a tacit agreement, as they are different concepts.<sup>110</sup> He concludes:

[I]t is an important fact that killing is specifically excluded from the agreement; and there is, therefore, no warrant to say that there was a tacit agreement that the other party should kill. So the basis for the parties’ liability in this robbery case is not tacit agreement. It seems to me to be foresight. And if it is foresight, the spectre of the *versari* doctrine will continue to haunt us.<sup>111</sup>

The fundamental problem of attribution devoid of a proper connection, being agreement, is accurately captured by Unterhalter’s warning:

Attribution which does not connect to the individual’s voluntary assumption of responsibility for the actions of another amounts to an imposition by way of legal imputation for action blameworthy neither for its harmful consequences nor for its willed adoption. Such an imposition is a gratuitous invasion of individual freedom.<sup>112</sup>

The second reason assailing the concept of mandate as a justification for the imputation of causation pertains to the fact that mandate as authorisation and as power of control fails to account for the imputation of causation from the principal perpetrator to a participant whose contribution was insignificant.<sup>113</sup> A participant who played a minor or even no contributory role to the ultimate unlawful consequence cannot be said to have authorised or exercised control over the principal perpetrator’s conduct.

De Wet interprets an additional approach to the mandate analogy, whereby mandate as contributory cause may provide the necessary normative justification for the imputation of causation. Mandate as contributory cause reflects the understanding of ‘psychological causation’, as it entails that a participant, through his mandate, being held liable *propter mandatum* for setting into motion a causal sequence of events.<sup>114</sup> However, Botha JA rejected the concept of ‘psychological causation’ in *Safatsa*, holding that it would stretch the concept

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<sup>109</sup> Ibid at 289.

<sup>110</sup> Ibid: “Tacit agreement comprehends an intimate understanding by one party that the other party would readily assent to a proposition if it were put to him. Foresight, on the other hand, comprehends no such understanding. From the fact that I foresee something, it doesn’t follow that I ought to think that my partners in common purpose foresee the same thing.”

<sup>111</sup> Ibid.

<sup>112</sup> Unterhalter op cit (n96) at 674.

<sup>113</sup> Walker op cit (n100) at 79-80.

<sup>114</sup> Ibid at 80; JC De Wet and HL Swanepoel *Strafreg* 3<sup>rd</sup> Ed (1985) 169-70, 173.



of causation to such unrealistic limits as to border on absurdity.<sup>115</sup> Walker submits that Botha JA's rejection was influenced by Hart and Honore, whereby they argued that "because human beings have independent volition, it can never be correct to speak of any person as having caused another's voluntary act and that, consequently, it is not permissible to attribute responsibility for one person's voluntary act to another on the principle of causation".<sup>116</sup>

Kadish provides a rebuttal against Botha JA's rejection of the concept of 'psychological causation', holding that a participant's act of causing the principal perpetrator to act is not based on the cause in the strict, scientific sense, but on a participant's ability to influence the principal perpetrator's voluntary act.<sup>117</sup> Kadish notes that a participant's liability will be dependent on the influence exerted being deliberate.<sup>118</sup> Similarly, mandate as contributory cause cannot justify the imputation of causation to a participant who played a minor or even no contributory role, as the participant cannot be said to have influenced the principal perpetrator's commission of the ultimate unlawful consequence.

Mandate as authorisation, or power of control, or contributory cause, fails to provide a normative justification for the imputation of causation in cases of common purpose by prior agreement. In cases of common purpose in its active association form, a possible justification for the imputation of causation cannot be based on the concept of mandate, as agreement does not comprise this distinct form of common purpose. A normative justification must thus exist elsewhere.

The normative justification for common purpose in its active association form is based on the satisfaction of the *Mgedezi* requirements.<sup>119</sup> Sisilana argues that the success of the justification depends on whether these requirements respect the principle of causation or not.<sup>120</sup> There are two noteworthy critiques against the *Mgedezi* requirements serving as an appropriate normative justification for the imputation of causation. First, as previously discussed, the requirements of active association are vague, amounting to a violation of the principle of legality, specifically the *ius certum* principle.<sup>121</sup>

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<sup>115</sup> *Safatsa* supra (n18) at 901C-D.

<sup>116</sup> Walker op cit (n100) at 81; HLA Hart & AM Honore op cite (n98) at 69.

<sup>117</sup> Walker op cit (n100) at 82; SH Kadish 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *California Law Review* 323 at 343-344.

<sup>118</sup> Kadish op cit (n117).

<sup>119</sup> Sisilana op cit (n26) at 301; Unterhalter op cit (n96) at 675.

<sup>120</sup> Sisilana op cit (n26) at 301.

<sup>121</sup> The vagueness of the requirement of active association is discussed in chapter 3.2.2.

Secondly, active association ignores the concept of methodological individualism, instead treating an individual's actions as a product of a collective mind or entity.<sup>122</sup> Botha JA's judgment in *Safatsa* exemplifies such a flaw, whereby he asserts that the accused shared a common purpose to kill the deceased with the mob as a whole.<sup>123</sup> Unterhalter captures the problem of criminal laws devoid of methodological individualism:

We either blame individuals for their actions or we do not attribute blame at all. The criminal law must always guard against reasoning on the basis of corporate blame. Consequences come about through individual actions and must be blamed upon individual actors either on the basis of what their actions bring about or derivatively on the basis of the actions which may properly be attributed to them.<sup>124</sup>

The significance attached to a collective mind or entity is further emphasised in instances where the identity of the principal perpetrator is unknown.<sup>125</sup> The application of the doctrine in this instance attributes the actions of the collective entity to the participants to the common purpose, thus ignoring the fundamental principle of 'methodological individualism'.

In conclusion, the concept of mandate and the fulfilment of the *Mgedezi* requirements cannot provide an unassailable normative justification for the imputation of causation in common purpose cases by prior agreement or in its active association form. The lack of a proper justification bolsters the constitutional arguments in this thesis, as the violation that ensues from the derogation of a causal nexus, specifically the infringement of the right to be presumed innocent, is not based on a credible normative justification.<sup>126</sup> The only possible remaining justification for the imputation of causation is the utilitarian rationale of crime control. Walker's assertion provides an apt conclusion to the available normative justifications for the imputation of causation:

The lack of any normative basis for the doctrine is highly problematic, however. It flies in the face of decades of legal development and refinement, in which our courts have generally striven to approach the criminal law on a rational, systematic and principled basis. It means

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<sup>122</sup> Unterhalter op cit (n96) at 676-7. The doctrine of methodological individualism holds that social phenomena must be explained by showing how they result from individual actions, which in turn must be explained through reference to the intentional states that motivate the individual actors.

<sup>123</sup> *Safatsa* supra (n18) at 894C-D.

<sup>124</sup> Unterhalter op cit (n96) at 677.

<sup>125</sup> This instance is detailed in the preface (page 2); Burchell op cit (n2) at 477; Rabie op cit (n86) at 231; *R v Ndhlalanga* 1946 AD 1101; *R v Ncube & Koza* 1950 (2) PH H211 (AD); *R v Sikepe* 1946 AD 745; *R v Matsiwane* 1942 AD 213; *R v Morela* 1947 (3) SA 147 (AD); *S v Nkomo* 1966 (1) SA 831 (AD); *R v Kubuse* 1945 AD 189; *Gaillard v S* 1966 (1) PH H74 (AD); *Safatsa* supra (n18); *Thebus* supra (n23).

<sup>126</sup> See the discussion in chapter 2.5 on the violation of an accused's right to be presumed innocent.

that the doctrine of common purpose is an aberration, since it then represents the *sole* remaining instance of what might be termed ‘unprincipled’ criminal liability in our common law.<sup>127</sup>

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<sup>127</sup> Walker op cit (n100) at 77.

### 3.4 FAULT OF COMMON PURPOSE

#### 3.4.1 Introduction

The doctrine of common purpose does not impute the *mens rea* of the principal offender to all other participants in the common purpose.<sup>128</sup> The State must prove that each accused had the necessary fault to be convicted of the specific offence.<sup>129</sup> The doctrine thus involves an assessment of *mens rea* identical to the assessment of *mens rea* in instances where the doctrine does not apply. Accordingly, *dolus eventualis*<sup>130</sup> and negligence<sup>131</sup> are sufficient forms of fault under the doctrine. The requirement of fault for each accused is argued to be a restraint on the ambit of liability of the doctrine.<sup>132</sup> However, the assessment of fault under the doctrine raises notable problems. First, the judgment in *Nkwenja*,<sup>133</sup> which considers the moment *mens rea* is assessed in common purpose cases, amounts to a revival of the *versari in re illicita* doctrine and violates the contemporaneity rule. Lastly, courts have failed to give effect to the cardinal rules for inferential reasoning delineated in *Blom*,<sup>134</sup> resulting in the improper determination of the existence of *dolus eventualis* in common purpose cases. This chapter details these problems arising from the assessment of fault under the doctrine.

#### 3.4.2 The moment *mens rea* is assessed

The AD's judgment in *Nkwenja* serves as the seminal judgment on the moment *mens rea* is assessed in common purpose cases. The majority, per Jansen JA with Joubert JA and Grosskopf AJA concurring, held that a participant's fault in common purpose cases is assessed at the time when the common purpose is created.<sup>135</sup> In contrast, Rabie CJ with Miller JA concurring, held that a participant's fault in a common purpose is assessed at the time when the principal perpetrator commits the unlawful conduct.<sup>136</sup> Burchell has criticised

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<sup>128</sup> *Mgedezi* supra (n21); *Thebus* supra (n23) para 49.

<sup>129</sup> *Ibid.*

<sup>130</sup> *S v Madlala* 1969 (2) SA 637 (A) 640; *R v Nsele*; *S v Shaik* 1983 (4) SA 57 (A); *S v Talana* 1986 (3) SA 196 (A); *S v Beukes* 1988 (1) SA 511 (A); *S v Mbatha* 1987 (2) SA 272 (A); *Nzo* supra (n32); *S v Khumalo* 1991 (4) SA 310 (A); *S v Molimi* 2006 (2) SACR 8 (SCA).

<sup>131</sup> *S v Geere* 1952 (2) SA 319 (A) 232; *Nkwenja* supra note 1 at 180; *S v Goosen* 1989 (4) SA 1013 (A) para 135; *S v Van der Merwe* 1991 (1) SACR 150 (T); *S v Whitehead* 2008 (1) SACR 431 (SCA).

<sup>132</sup> MC Mare 'The Doctrine of Common Purpose in South African Law' in JJ Joubert *Essays in honour of S.A Strauss* (1995) 113-33 at 122-3.

<sup>133</sup> *Nkwenja* supra (n1).

<sup>134</sup> *R v Blom* 1939 AD 188.

<sup>135</sup> *Nkwenja* supra (n1).

<sup>136</sup> *Ibid* at 665-6.

the majority judgment, arguing that the majority's assessment of fault in common purpose cases revives the doctrine of *versari in re illicita* and violates the contemporaneity rule.<sup>137</sup>

The doctrine of *versari in re illicita*, which is an exception to the contemporaneity rule, holds that a person who committed an unlawful act is criminally liable for all the consequences that followed.<sup>138</sup> The application of the *versari* doctrine resulted in strict liability, as the state of mind of the accused in relation to the consequences of the accused's act was immaterial. The AD had earlier rejected the *versari* doctrine, as it violated the principle of fault-based punishment.<sup>139</sup> Burchell submits that, due to the majority judgment in *Nkwenja* ignoring a participant's change in the mental state, the conviction amounts to 'versari-type liability'.<sup>140</sup>

In *Nkwenja*, the two appellants in a common purpose committed robbery. At the time the common purpose was formulated, the death of the deceased was reasonably foreseeable, but not foreseen. Contrastingly, at the time the deceased was killed, death was not foreseen and there was also reasonable doubt as to whether death was reasonably foreseen.<sup>141</sup> Nevertheless, the appellants were found guilty of culpable homicide, as death was reasonably foreseeable at the time the common purpose was formulated. Burchell comments as follows:

If the death of the victim in *Nkwenja* had been caused by a single individual, not acting in concert with another, there would be no doubt that he would, on the evidence, have to be acquitted of culpable homicide and this conclusion would be borne out by the decision of the Appellate Division in *Van As* and *Bernadus*. Why should the participants in a common purpose be judged any differently?<sup>142</sup>

In *Van As*<sup>143</sup> and *Bernadus*,<sup>144</sup> the AD held that on a charge of culpable homicide, the State must prove beyond reasonable doubt that a reasonable person in the position of the accused would have foreseen the possibility that death would occur. However, in *Nkwenja*, the majority's assessment of fault at the time the common purpose was formulated disregards the change in an accused's mental state, thus implanting the fictional reasonable person in the

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<sup>137</sup> Burchell op cit (n2) at 497-8.

<sup>138</sup> *S v Matsepe* 1931 AD 150; *S v Wallendorf* 1920 AD 383.

<sup>139</sup> *S v Van der Mescht* 1962 (1) SA 521 (A); *S v Bernadus* 1965 (3) SA 287 (A).

<sup>140</sup> Burchell op cit (n2) at 497.

<sup>141</sup> *Nkwenja* supra (n1) at 570B-D.

<sup>142</sup> Burchell op cit (n2) at 497-498.

<sup>143</sup> *S v Van As* 1976 (2) SA 921 (A).

<sup>144</sup> *Bernadus* supra (n139).

position of the complainant also at the time the common purpose was formulated, as opposed to when the unlawful conduct occurred.<sup>145</sup>

Courts have vacillated between the application of the majority and minority judgment in *Nkwenja*. Boister<sup>146</sup> observes that in *Mitchell*,<sup>147</sup> Nestadt JA assessed the *mens rea* of the second appellant to the common purpose at the time the first appellant (principal offender) threw the brick and killed the pedestrian.<sup>148</sup> Nestadt JA disregarded the majority judgment in *Nkwenja*, instead following the minority judgment, whereby the fault of a participant in a common purpose was assessed when the principal offender committed the unlawful conduct of throwing the brick and killing the pedestrian.<sup>149</sup> Contrastingly, in *Munonjo*,<sup>150</sup> the trial court convicted the appellants of murder on the basis that when they had broken into the farmhouse to steal the keys to the deceased's car and money for petrol, they already had formulated a common purpose to murder. However, the AD held that it had not been proved that the appellants subjectively foresaw the possibility of death and that there was consequently no basis upon which the appellants could have been convicted of murder. The AD's decision was based on the application of the majority judgment in *Nkwenja*. The court reasoned that it could not be proved that the appellants foresaw that one of them would have disarmed the deceased who had the firearm and killed both the deceased. However, had the court applied the minority judgment of *Nkwenja*, the court would have accounted for the appellants' change in mental state, which would have proven foresight.

The decision in *Munonjo* reiterates the effect of the majority judgment in *Nkwenja*, whereby an application of the majority judgment can either benefit or disadvantage an accused. The CC in *Thebus* does seem to endorse the minority judgment of *Nkwenja*.<sup>151</sup> However, *Thebus* concerned the doctrine of common purpose in its active association form, thus confining the assessment of *mens rea* to only one of the forms of common purpose.<sup>152</sup> Nevertheless, the application of either the majority or minority judgment in *Nkwenja* poses a threat to the contemporaneity rule.

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<sup>145</sup> A participant's right to equality may be infringed, as a single individual, not acting in concert with another would instead be acquitted.

<sup>146</sup> N Boister 'Common Purpose: Association and Mandate' (1992) 5 *SACJ* 167.

<sup>147</sup> *S v Mitchell* 1992 (1) SACR 17 (A).

<sup>148</sup> *Ibid* at 22g-h; Boister *op cit* (n146) at 169.

<sup>149</sup> The minority judgment in *Nkwenja* was also supported in *S v Dladla* 2010 JDR 1021 (KZP).

<sup>150</sup> *S v Munonjo* 1990 (1) SACR 360 (A).

<sup>151</sup> *Thebus* *supra* (n23) paras 37 and 49.

<sup>152</sup> Burchell *op cit* (n2) at 496.

The contemporaneity rule requires that where the definitional elements of the crime necessitate *mens rea*, the *actus reus* must exist contemporaneously with that *mens rea* before an accused can be criminally liable.<sup>153</sup> An application of the majority judgment in *Nkwenja* would violate the contemporaneity rule, as the *mens rea* is assessed at the earlier time the common purpose was formulated, whilst the participant's imputed *actus reus* is assessed at a later time when the principal perpetrator committed the ultimate unlawful consequence. The majority judgment presents an additional violation of the contemporaneity rule, similar to that of the minority judgment.

The contemporaneity rule is premised on the dogma that the function of criminal law is not to judge an accused's general behaviour over a period of time, but is rather concerned with the distinct criminal conduct charged.<sup>154</sup> The doctrine of common purpose, applied using the majority or minority judgment, involves the imputation of the principle perpetrator's *actus reus* to the other participants in the common purpose. The contemporaneity rule necessitates an assessment of the *actus reus* of the individual participant in order to establish whether the participant's causal contribution co-existed with the requisite fault of the offence committed.<sup>155</sup> However, the doctrine entails an assessment of the principal perpetrator's *actus reus*, which is then imputed to the participant. The participant's *actus reus* is not individually assessed, meaning there is no determination of whether the participant's causal contribution existed contemporaneously with the requisite fault.

### **3.4.3 *Dolus eventualis* and inferential reasoning**

*Dolus eventualis* is a sufficient form of fault when establishing the guilt of a participant in a common purpose.<sup>156</sup> The AD's judgment pertaining to *dolus eventualis* in common purpose instances has been applied with approval in all subsequent common purpose cases.<sup>157</sup> In cases involving common purpose, courts utilise the process of inferential reasoning to determine the existence of *dolus eventualis*.<sup>158</sup> However, the process of inferential reasoning poses significant problems, as the courts are able to justify fault based on trivial acts of association. Inferential reasoning was not generally improperly applied during apartheid, as a number of

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<sup>153</sup> Ibid at 117, 445-6.

<sup>154</sup> Ashworth op cit (n8) at 157.

<sup>155</sup> Ibid at 80.

<sup>156</sup> Supra note 130.

<sup>157</sup> Ibid.

<sup>158</sup> Cameron (1998) op cit (n20).

cases displayed an exemplary application of the cardinal rules of inferential reasoning.<sup>159</sup> However, the infamous cases of *Safatsa* and *Nzo* highlight the problematic instances where the judiciary was able to ignore the cardinal rules in favour of crime control and the suppression of political uprising. A similar problem manifested post-apartheid, whereby the improper use of inferential reasoning could justify the establishment of the *Mgedezi* requirements.

The AD in *Blom*<sup>160</sup> established two cardinal rules for reasoning by inference in criminal cases. First, the inference sought to be drawn must be consistent with all the proven facts: if it is not, the inference cannot be drawn. Secondly, the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proven facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.<sup>161</sup> Schmidt expands on the second rule in *Blom*, noting that the rule requires the exclusion of “any reasonable alternative hypothesis”.<sup>162</sup> An additional caveat on the *Blom* rule is provided by the AD in *Essack*,<sup>163</sup> where the court noted Lord Wright’s caution against mistaking inference with conjecture or speculation.<sup>164</sup>

The application of the cardinal rules established in *Blom* serves as a necessary limitation when determining the existence of *dolus eventualis*. However, courts have failed to accurately give effect to the cardinal rules, instead, courts have adopted a crime control approach to inferential reasoning.<sup>165</sup> The infamous cases of *Safatsa* and *Nzo* have been criticised due to the court’s improper inferential reasoning.

In *Safatsa*, five of the accused were convicted of murder based on the testimony of eyewitnesses. However, the conviction against accused 3 was secured by the process of inferential reasoning. Accused 1, who was the first accused arrested for the murder of the Deputy Mayor, reported to the police the whereabouts of the pistol taken from the deceased. The police were directed to the home of accused 3, where they asked accused 3 if he knew about a pistol. Accused 3 answered affirmatively and handed the pistol, which was stored in his ceiling, to the police. Accused 3 denied involvement in the murder, and told the police

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<sup>159</sup> See Petersen supra (n42); Yelani supra (n34).

<sup>160</sup> *Blom* supra (n134).

<sup>161</sup> Ibid 202-3.

<sup>162</sup> WH Schmidt *Bewysreg* 2<sup>nd</sup> Ed (1982) at 87.

<sup>163</sup> *S v Essack* 1974 (1) SA 1 (A).

<sup>164</sup> *Caswell v Powell Duffryn Associated Collieries Ltd* (1939) ALL ER 722 (HL) at 733.

<sup>165</sup> *R v Nsele* 1955 2 SA 148 (A) at C-D.



that he had obtained the pistol from a group of children who participated in the rioting on the day of the deceased's murder. Later, accused 3 stated to a magistrate that he obtained the pistol from a group of children, but that it was obtained one day after the death of the deceased, thus denying the earlier statement made to the police. Accused 3 and accused 1 could not provide any explanation as to why accused 1 was able to direct the police to the home of accused 3 where the pistol was retrieved. On the sum of this evidence, accused 3 was sentenced to hang.

Justice Edwin Cameron argued that there were at least three flaws in the court's reasoning. The first flaw relates to the court's failure to consider accused 3's demeanour and actions towards the police.<sup>166</sup> Cameron contends that the inference that accused 3 took the pistol based on his reactions to the police is inconsistent with the first rule in *Blom*.<sup>167</sup> The trial court and the AD relied on the lie accused 3 told regarding how he came to be in possession of the pistol in order to convict accused 3. However, both courts failed to recognise that the proved facts included accused 3's willing admission of possession of the pistol and handing it to the police. Furthermore, the courts ignored the fact that if accused 3 lied to absolve his participation in the murder, then why did accused 3 not deny possession of the pistol or conceal it? The second flaw pertains to both courts failing to account for the passing of 67 days between the murder of the Deputy Mayor and the retrieval of the pistol from accused 3's home.<sup>168</sup> Cameron argues that the long passing of time gives rise to a number of ways in which accused 3 could have come to possess the pistol.<sup>169</sup> Furthermore, Cameron submits that the fact that accused 3 was in possession of the pistol and accused 1 directed the police to accused 3's home, merely proves that accused 1 knew that accused 3 was in possession of the pistol.<sup>170</sup> The third flaw relates to the AD disregarding the precedent on untruthful accused.<sup>171</sup> Cameron argues that the lie told by accused 3 to the police is immaterial, as on a proper application of the principles reaffirmed in *Steynberg*<sup>172</sup> and *Mtsweni*,<sup>173</sup> the lie could have been told for a number of reasons incompatible with guilt.<sup>174</sup>

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<sup>166</sup> Cameron (1998) op cit (n20) at 251.

<sup>167</sup> Ibid at 252.

<sup>168</sup> Ibid at 253.

<sup>169</sup> Ibid at 254.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> *S v Steynberg* 1983 (3) SA 140 (AD).

<sup>173</sup> *S v Mtsweni* 1985 (1) SA 590 (A).

<sup>174</sup> Ibid at 255-6.

Burchell argues that the judgment in *Nzo* evinces another instance where the court exercised improper inferential reasoning.<sup>175</sup> In *Nzo*, the trial court held that there was a common purpose “on the part of the terrorists and some accused to commit acts of sabotage” and that fatalities “must have been foreseen and by inference, were foreseen by the participants of that common purpose.”<sup>176</sup> The trial court relied on the ANC pamphlets, which described informers as traitors and deserving of death, to draw an inference that the appellants foresaw the possibility that an informer, or possible informer, such as Mrs T, could be killed.<sup>177</sup> On appeal, the appellants did not challenge this inference or the conclusion reached that they foresaw the possibility of Mrs T’s death. Burchell submits that there was insufficient evidence to draw an inference of an intention of the appellants to make common cause, as “subscribing to the overarching policies of an organisation is not and should not be sufficient to link members to the specific murder committed by another member.”<sup>178</sup> A similar improper inference was drawn by the court in *Thebus*, whereby the court failed to consider other reasonable inferences for joining the protesting group, carrying a pick handle, holding a gun (but not witnessed shooting it), and retrieving spent cartridges.<sup>179</sup> Hoffmann and Zeffertt’s academic caveat to the cardinal rules in *Blom*, also serves as a pertinent conclusion regarding the court’s tendency to draw improper inferences in common purpose cases:

It sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not proved and cannot be legitimately inferred.<sup>180</sup>

### **3.4.4 Conclusion**

The majority’s judgment in *Nkwenja* entails a departure from the fundamental principle of *mens rea*, whereby the required *mens rea* is inferred either from some less blameworthy state of mind or from the unlawful or immoral character of the act.<sup>181</sup> Furthermore, on the adoption of either the majority or minority’s judgment in *Nkwenja*, the *actus reus* and the *mens rea* of a participant in a common purpose need not exist contemporaneously. A further problem exposed in this chapter relates to the court’s continuous improper inferential reasoning to

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<sup>175</sup> Burchell op cit (n34).

<sup>176</sup> *Nzo* supra (n31) at 4G-H; Burchell op cit (n2) at 481.

<sup>177</sup> Burchell ibid.

<sup>178</sup> Burchell op cite (n34) at 349.

<sup>179</sup> Burchell op cit (n2) at 486.

<sup>180</sup> LH Hoffmann and D Zeffertt *South African Law of Evidence* 3<sup>rd</sup> Ed (1983) at 464.

<sup>181</sup> CR Snyman *Criminal Law* 2<sup>nd</sup> Ed (1989) at 240.

establish *dolus eventualis* in common purpose cases. The courts' have allowed the need to control crime to adversely influence the process of inferential reasoning.

## 3.5 DEFENCE AGAINST COMMON PURPOSE

### 3.5.1 Introduction

The wide liability accrued under common purpose has come under criticism in a number of instances, whereby a limitation on the doctrine's liability was demanded.<sup>182</sup> Proponents argue that the law related to dissociation from the common purpose serves as a limitation of the liability under the doctrine. However, the vagueness of the defence of dissociation and, in many instances, the unavailability of the defence render the defence of dissociation weak.<sup>183</sup> Fortunately, there are two further possible defences that a participant may rely on to negate liability. First, the AD's judgment in *Goosen*,<sup>184</sup> regarding the defence of mistake as to the causal sequence, may limit liability in common purpose cases. Secondly, Grant's theoretical defence of mistake of law in common purpose cases may provide an additional limitation on common purpose liability.<sup>185</sup> This chapter discusses the effectiveness of the defences of mistake as to the causal sequence and mistake of law in common purpose cases, noting the problems associated with the defences.

### 3.5.2 Mistake as to the causal sequence

This chapter provides an exposition of the application of the *Goosen*-rule in subsequent common purpose cases to support Burchell's claim that "the rule will serve as a valuable way of limiting liability in common purpose cases."<sup>186</sup> However, heeding Snyman's articulation that "the courts, in subsequent cases in which there were strong possibilities that X was mistaken as to the causal chain of events, decided the matters without applying or even referring to the novel rule applied in *Goosen*",<sup>187</sup> the value of the defence of mistake as to the causal sequence diminishes.

The legal question posed by Van Heerden AJA in *Nhlapo*,<sup>188</sup> "whether *dolus eventualis* requires foresight not only of a consequence but also of the causal sequence

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<sup>182</sup> Cameron (1998) op cit (n20); Burchell op cit (n34); J Burchell 'Joint enterprise and common purpose: perspectives in English and South African criminal law' (1997) 10 *SACJ* 120; Cameron (2004) op cit (n20).

<sup>183</sup> See the discussion in chapter 3.2.3 on the vagueness of the defence of dissociation.

<sup>184</sup> *S v Goosen* 1989 (4) SA 1013 (A) translated in J Burchell *Cases and Materials on Criminal Law* 4<sup>th</sup> Ed (2016).

<sup>185</sup> J Grant 'Common Purpose: Thebus, Marikana and Unnecessary Evil' (2004) 30 *SAJHR* at 18.

<sup>186</sup> Burchell op cit (n34); J Burchell 'Mistake or ignorance as to the causal sequence- A new aspect of intention' (1990) 107 *SALJ* 168 at 171.

<sup>187</sup> Snyman op cit (n3) at 192.

<sup>188</sup> *S v Nhlapo* 1981 (2) SA 744 (A).

leading to the consequence”,<sup>189</sup> remained unanswered amongst legal academics.<sup>190</sup> In *Goosen*,<sup>191</sup> the AD, favouring German criminal theorists, answered the question, holding that “in a consequence crime, intention is lacking where an accused’s foresight of the causal sequence differs markedly from the actual causal sequence”.<sup>192</sup> Van Heerden JA discussed the *Goosen*-rule in relation to *dolus*. The AD held that where *mens rea* takes the form of *dolus directus*, an accused’s mistake as to the causal sequence is irrelevant, as the deviation between the accused’s foresight of the causal sequence and the actual causal sequence will not readily be regarded as material.<sup>193</sup> Nevertheless, the AD noted the possibility of exceptions to this rule. Contrastingly, where *mens rea* takes the form of *dolus eventualis*, the AD held that an accused’s mistake as to the causal sequence will negative criminal liability.<sup>194</sup> The AD addressed the question as to “how the line is to be drawn between deviations excluding intention and those not having that effect.”<sup>195</sup> Van Heerden JA asserted that foresight of the precise manner in which the actual sequence occurred is not required. Instead, Van Heerden submitted that a marked or material difference exists where the deviation between the actual and foreseen sequence differs to such an extent that it cannot reasonably be said that the accused envisaged the actual sequence.<sup>196</sup> Van Heerden JA left the explication of the guidelines of the ‘material deviation’ test to courts.<sup>197</sup>

In *Goosen*, the AD set aside the appellant’s conviction of murder under common purpose, as the actual death of Mr Marais by Mr Mazibuko involuntarily discharging his firearm was not foreseen by the appellant. However, the appellant was found guilty of culpable homicide, as a reasonable person in the position of the appellant would have foreseen the possibility of death resulting from involuntarily discharging the firearm. The application of the *Goosen*-rule in common purpose cases was later developed by the AD in *Mitchell*.<sup>198</sup>

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<sup>189</sup> Ibid at 750F.

<sup>190</sup> See A Paizes ‘Mistake as to the causal sequence and mistake as to the causal act: Exploring the relation between mens rea and the causal element of the actus reus (1993) 110 SALJ 493; See further EM Burchell & PMA Hunt *South African Criminal Law and Procedure vol I: General Principles of Criminal Law* 2<sup>nd</sup> Ed (1983) at 150; Snyman op cit (n3) at 200.

<sup>191</sup> *Goosen* supra (n184).

<sup>192</sup> Ibid at 528.

<sup>193</sup> Ibid at 524-6; Cf *S v Masilela* 1968 (3) SA 558 (A) and *S v Daniels* 1983 (3) SA 275 (A).

<sup>194</sup> Burchell (1990) op cit (n186) at 525-6; cf *S v Nkombani* 1963 (4) SA 877 (A).

<sup>195</sup> Burchell (1990) op cit (n186) at 527.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> *S v Mitchell* 1992 (1) SACR 17 (A).

In *Mitchell*, the two appellants and two other teenagers agreed to throw stones at pedestrians from the back of a moving Landrover vehicle.<sup>199</sup> However, appellant 1 collected a brick, which he threw at a group of pedestrians. The brick struck and killed a pedestrian. Nestadt JA held that appellant 1's throwing of the brick that caused the death fell outside the ambit of the common purpose of throwing stones.<sup>200</sup> The court asserted that there was a marked difference of the size and consequences between the brick and the stones.<sup>201</sup> Furthermore, the court accepted the evidence that the second appellant did not foresee that the first appellant would throw the brick and kill someone.<sup>202</sup> Therefore, the second appellant did not have requisite *mens rea* and was acquitted of murder. The court then considered whether the second appellant's association in a common purpose to throw stones could warrant a conviction of assault for the first appellant throwing a brick.<sup>203</sup> Nestadt JA elucidated the principle in *Shezi*:<sup>204</sup>

[T]he liability of parties to a common purpose depends on whether the result produced by the perpetrator of the act falls within the mandate and is not concerned with the means by which the result is produced.<sup>205</sup>

Greenberg JA's judgment in *Shezi* seemingly serves as a limitation of the *Goosen*-rule. However, Nestadt JA held that the *Goosen*-rule, at least in *dolus eventualis* cases, invalidates the principle in *Shezi*.<sup>206</sup> Nestadt JA asserted that, due to the different means employed by the first appellant, his actions fell outside the scope of the common purpose. The imputation of the first appellant's action to the second appellant amounts to an application of the *versari in re illicita* doctrine.<sup>207</sup> Therefore, the AD did not convict the second appellant for assault. Despite the AD's development of the *Goosen*-rule in common purpose cases, as well as Burchell's exposure of the defence limiting liability under the doctrine, in a number of common purpose cases where the defence provided by the *Goosen*-rule was fitting, courts have overlooked the defence.

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<sup>199</sup> Ibid at 19.

<sup>200</sup> Ibid at 21i-22b; Boister op cit (n146) at 168.

<sup>201</sup> *Mitchell* supra (n198) at 21i-22b.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid at 23b.

<sup>204</sup> *R v Shezi* 1948 (2) SA 119 (A).

<sup>205</sup> Ibid at 128; cited with approval in *R v Chenjere* 1960 (1) SA 473 (FC) at 476E-477A; *Mitchell* supra (n198) at 23d.

<sup>206</sup> *Mitchell* supra (n198) at 23e.

<sup>207</sup> Ibid at 23f.

In *Nair*,<sup>208</sup> the second appellant assaulted the deceased and then, with the first appellant's help, threw the deceased's body into the sea. The evidence did not establish which was the cause of the death, namely the assault or the drowning. Furthermore, there was no evidence suggesting whether the second appellant intended to kill the deceased by assaulting or drowning him. The majority, per Nestadt JA, who delivered an exemplary judgment of the application of the *Goosen*-rule one year earlier in *Mitchell*, failed to consider the second appellant's mistake as to the causal sequence.<sup>209</sup> Nestadt JA, in assuming that the deceased was no longer alive when he was thrown into the bay, held that the second appellant must have foreseen that the deceased might die as a result of the assault.<sup>210</sup> Furthermore, Nestadt JA asserts "the same, of course, applies if the deceased was still alive when he was thrown into the water."<sup>211</sup> However, if the court had considered the *Goosen*-rule and the application thereof in *Mitchell*, the court's conclusion may have differed.

Arguably, the second appellant could have foreseen that death would result from the assault, whilst death from the drowning was not foreseen. Alternatively, the second appellant could have foreseen that death would result from drowning, whilst death resulting from the assault was not foreseen. However, there was no evidence suggesting the cause of the death and whether the second appellant intended to kill the deceased by assaulting or drowning him. It is submitted that in the event the court considered the *Goosen*-rule, the evidence would have suggested one of the possible causal sequences. In the event that the cause of death and the second appellant's foresight of the causal sequence did not correlate, the second appellant would have been found innocent of murder. Similarly, in *Lungile*,<sup>212</sup> Olivier JA ignored the *Goosen*-rule as a defence of *dolus* on the part of the first appellant.<sup>213</sup>

The cases of *Safatsa*, *Nzo* and *Thebus* are further instances where the application of the *Goosen*-rule was suitable, but ignored by the courts. The SCA's judgment in *Molimi*<sup>214</sup> provides a noteworthy caution in favour of a proper application of the *Goosen*-rule in common purpose cases, whereby Cachalia AJA held:

The common purpose doctrine does not require each participant to know or foresee every detail of the way in which the unlawful result is brought about. But neither does it require

<sup>208</sup> *S v Nair* 1993 (1) SACR 451 (A).

<sup>209</sup> Snyman op cit (n3) at 192.

<sup>210</sup> *Nair* supra (n208) at 452.

<sup>211</sup> Ibid.

<sup>212</sup> *S v Lungile* 1999 (2) SACR 597 (SCA).

<sup>213</sup> Snyman op cit (n3) at 192.

<sup>214</sup> *S v Molimi* 2006 (2) SACR 8 (SCA).

each participant to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose.<sup>215</sup>

However, despite the development of the *Goosen*-rule in common purpose cases serving as a welcome limitation of the liability under the doctrine, courts and defence lawyers alike have failed to apply the *Goosen*-rule in common purpose cases. Thus, the effectiveness of the defence is reduced to a benefit of competent judges and lawyers.

### 3.5.3 *Mistake of Law*

Professor Grant introduces another possible defence to liability under the doctrine of common purpose. He argues that the defence recognised in *De Blom*<sup>216</sup> may serve as a limit on the liability in common purpose cases.<sup>217</sup> From the outset, it must be noted that the defence recognised in *De Blom* has never been raised in a common purpose case. This chapter presents a defence of mistake of law that may theoretically be raised in common purpose cases.

*Ignorantia juris non excusat* was a rule of South African law, meaning knowledge of unlawfulness is not an element of intention.<sup>218</sup> The judgment in *De Blom* eradicated the rule, holding that an accused's knowledge of the unlawfulness of his conduct is a requirement of *mens rea*.<sup>219</sup> Accordingly, mistake of law serves as a defence, excluding criminal liability.<sup>220</sup> Where a crime requires intention, an accused's mistake of law is determined subjectively, whereas an offence necessitating negligence is objectively determined, requiring an accused's mistake of law to be genuine and reasonable.<sup>221</sup> The success of the defence depends on whether an accused's mistake of law is essential and genuine.<sup>222</sup> A genuine mistake of law necessitates the accused's ignorance or mistaken belief to be bona fide, whilst an essential mistake of law pertains to an essential element of the crime, being unlawfulness.<sup>223</sup>

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<sup>215</sup> Ibid para 36.

<sup>216</sup> *S v De Blom* 1977 (3) SA 513 (A) (translation by J Burchell *Cases and Materials on Criminal Law* 3 Ed (2007) at 462).

<sup>217</sup> Grant op cit (n185) at 18.

<sup>218</sup> *S v Werner* 1947 2 SA 828 (A) 833; *S v Sachs* 1953 1 SA 392 (A) 409; *S v Tshwape* 1964 3 SA 327 (C); *S v Lwane* 1966 2 SA 433 (A); CRM Dlamini 'In defence of the defence of ignorance of law' (1989) 2 *SACJ* 13 at 14.

<sup>219</sup> *De Blom* supra (n216) at 529.

<sup>220</sup> Burchell op cit (n2) at 388; CRM Dlamini 'Ignorance or mistake of law as a defence in criminal law' (1987) 50 *THRHR* 43.

<sup>221</sup> *De Blom* supra (n216) at 532.

<sup>222</sup> *S v Abrahams* 1981 (4) SA 982 (C); *S v Waglines (Pty) Ltd* 1986 (4) SA 1135 (N) at 1145G-H.

<sup>223</sup> Ibid; Dlamini op cit (n218) at 15.



Grant argues that “the attribution of conduct under the doctrine of common purpose is a function and question of law. A mistake regarding its legal function is a mistake of law, and, depending on the form of fault, may lead to a complete acquittal”.<sup>224</sup> An accused participant charged with murder under common purpose may argue that he did not know or foresee that, as a function of law, the conduct of the principal perpetrator would be imputed to him.<sup>225</sup> Alternatively, an accused participant charged with culpable homicide under common purpose may argue that his mistake regarding the imputation of causation from the principal perpetrator to himself was reasonable.<sup>226</sup>

Grant concludes that “it does not seem a stretch to argue that if an accused did not know the effect of common purpose, then s/he may raise the defence of lack of fault. Thus, it seems, that on a proper application of the defence of mistake of law alone, the Marikana miners ought not to be convicted under common purpose”.<sup>227</sup> However, Grant failed to consider the AD’s judgment in *Hlomza*,<sup>228</sup> whereby the meaning of ‘unlawfulness’ under the defence of knowledge of unlawfulness was clarified. In *Hlomza*, the AD noted that the accused does not have to know the detailed requirements of the crime, the provisions of the applicable law, or the specific penalty attached to the crime.<sup>229</sup> The accused must merely know that the conduct is contrary to law in the broad sense.<sup>230</sup> It is uncertain how the AD’s judgment would pertain to common purpose cases, as the conduct may refer to joining the common purpose, the participant’s specific contribution, or the conduct that results in the ultimate unlawful consequence. Nevertheless, on any aforementioned approach, the defence necessitates recognition of the principle of culpability and fair labelling, whereby Milton’s commentary on the effect of *De Blom* bears repeating:

These decisions have one common philosophical basis: that punishment is only properly inflicted when it is deserved; that desert follows from individual blameworthiness; that blameworthiness is a function of decisions made with a mature free will and a conscious awareness of wrong doing. One who because of ignorance does not know that he is transgressing the law...is not blameworthy and thus ought not to be punished.<sup>231</sup>

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<sup>224</sup> Grant op cit (n185).

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid at 20.

<sup>228</sup> *S v Hlomza* 1986 (1) SA 25 (A).

<sup>229</sup> Ibid at 31-2.

<sup>230</sup> Ibid.

<sup>231</sup> JRL Milton ‘Criminal Law in South Africa 1976-1986’ (1987) *Acta Juridica* 43.

The wide liability accrued under common purpose demands limitation. The defence of mistake as to the causal sequence may serve this demand, but the reality of the court's disregard of the defence renders this limitation meaningless. The application of the defence of mistake of law in common purpose cases is a plausible defence. However, given the fact that the *Goosen*-rule is continuously ignored in common purpose cases, it hardly seems likely that the defence of mistake of law will be recognised and applied as a possible defence to limit liability under the doctrine. The defences of mistake as to the causal sequence and mistake of law seemingly realise the necessity of limiting liability under common purpose, but the associated problems frustrate the achievement of curtailing a doctrine that sacrifices legal principles and violates constitutional rights in favour of crime control.

### 3.6 CONCLUSION

The doctrine of common purpose contradicts a number of criminal law principles. This chapter has shown that the requirement of ‘active association’ and the defence of dissociation violate the *ius certum* principle, as both the requirement and the defence are inherently vague. Furthermore, upon scrutinising the normative justifications for the imputation of causation proffered by the courts, it appears that the justifications are assailable for a number of reasons. The problems associated with the assessment of fault in common purpose cases has been exposed, noting the revival of the *versari* doctrine, the violation of the contemporaneity rule, as well as the court’s improper inferential reasoning. The ineffective value of the defences of mistake as to the causal sequence and mistake of law as a means to curtail the wide liability accrued under common purpose has also been identified. The subsequent chapter serves as a conclusion to this thesis, whereby a discussion on the reformation of the doctrine is presented.

## CHAPTER 4

### REFORMING THE DOCTRINE OF COMMON PURPOSE

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#### 4.1 INTRODUCTION

A detailed theory of reforming the common purpose doctrine is beyond the scope of this thesis. Nevertheless, this chapter will discuss the major recommendations for reform. The recommendations may be categorised into three schools of thought, namely (i) complete retention of the current doctrine; (ii) partial reform in terms of Walker's substantial contribution theory<sup>1</sup> and; (iii) abolition and replacement of the doctrine. This chapter analyses each school of thought with reference to the constitutional and principled findings in this thesis. The chapter closes with the writer's recommendation.

#### 4.2 THREE SCHOOLS OF THOUGHT

##### 4.2.1 *Complete retention*

The retention of common purpose stems from the arguments presented by Moseneke J and Snyman. In *Thebus*, Moseneke J held that common purpose, in its active association form, does not need to be developed as commanded by s 39(2) of the Constitution.<sup>2</sup> His arguments were premised on the doctrine's necessary existence to achieve crime control.<sup>3</sup> Snyman welcomed the Constitutional Court's (hereinafter CC) judgment in *Thebus*, although basing his support for the retention of the doctrine on alternative grounds, namely overcoming the difficulty or impossibility of proving the element of causation.<sup>4</sup> Snyman's call for complete retention of the doctrine is predicated on the CC's endorsement in *Thebus*. However, given the findings of this thesis, specifically the unconstitutionality of the doctrine<sup>5</sup> and the

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<sup>1</sup> SA Walker A *Critical Evaluation of the Doctrine of Common Purpose in South African Law* (unpublished LLM thesis, University of KwaZulu-Natal, 2013) at 150-6.

<sup>2</sup> *Thebus v S* 2003 (6) SA 505 (CC) para 50.

<sup>3</sup> A breakdown of the Constitutional Court's judgment is presented in chapter 2.2.3.

<sup>4</sup> CR Snyman *Criminal Law* 6<sup>th</sup> Ed (2014) at 256; Alkema J in *Mzwempi v S* 2011 (2) SACR 237 (ECM) paras 43-6 expresses a similar sentiment.

<sup>5</sup> The constitutionality of the common purpose doctrine is challenged in chapter 2.

violation of a number of criminal law principles,<sup>6</sup> the call for complete retention cannot validly be maintained.

The current application of the doctrine thus necessitates some form of reform that respects a participant's constitutional rights and the principles of criminal law. Walker has provided recommendations for reforming common purpose, aimed at addressing the doctrine's constitutional and principled violations.<sup>7</sup>

#### ***4.2.2 Substantial contribution theory***

Walker advocates for the partial reform of common purpose, guided by the principles of culpability and fair labelling.<sup>8</sup> Her recommendations are largely based on Dressler's theory of reforming American complicity law.<sup>9</sup> Walker submits that the liability of a co-perpetrator under common purpose should be earmarked for instances where the participant's conduct is sufficient to render the participant as an 'indirect' perpetrator, thus according with the maxim *qui facit per alium facit per se*.<sup>10</sup> Walker argues that the requirements for association<sup>11</sup> should not constitute a sufficient requirement for liability as a co-perpetrator.<sup>12</sup> Instead, in order for the participant to be regarded as an 'indirect' perpetrator, liability should arise from a participant's association plus a substantial contribution to the conception, planning or execution of the crime.<sup>13</sup> Walker recommends that only the following secondary participants should be deemed co-perpetrators under the doctrine:<sup>14</sup>

- (a) A conspirator who also instigates (procures or otherwise authorises) the commission of the crime by the actual perpetrator;<sup>15</sup>
- (b) A conspirator who also plays a substantial role in the conception and/or planning of the crime;
- (c) A party to a common purpose, whether formed by conspiracy or active association, who also plays a substantial role in the execution of the crime.<sup>16</sup>

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<sup>6</sup> The doctrines adherence to criminal law principles is assessed in chapter 3.

<sup>7</sup> Walker op cit (n1).

<sup>8</sup> Ibid at 150.

<sup>9</sup> J Dressler 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence' (2008) 5 *Ohio State Journal of Criminal Law* 427.

<sup>10</sup> Walker op cit (n1) at 151.

<sup>11</sup> 'Association' here refers to the requirements for prior agreement and active association.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Walker notes that in this context, the term 'authorised' should not include fictional or constructive (implied) authorisation.

A secondary participant that does not fall within one of the above categories would be liable as an accomplice. Walker submits that the present law of accomplice liability does not require reform, but rather a clarification on the nature of the causal relationship between the conduct of the accomplice and the commission of the crime by the actual perpetrator.<sup>17</sup> She argues that the causal nexus be determined by the accomplice's conduct "facilitating the commission of the crime in some way (that is to say, makes it easier, more expeditious, or more convenient for the actual perpetrator to commit the crime), even if the crime could and probably would have been committed without the accomplice's contribution".<sup>18</sup> The individuals, who do not satisfy the definition of the reformed category of co-perpetrators or qualify as an accomplice, will be liable for alternative convictions.<sup>19</sup>

Walker argues that on her theory, no legitimate objection to the imputation of the principal perpetrator's conduct to the secondary participant can be levelled.<sup>20</sup> She submits that a participant's liability being based on considerations other than causation, namely substantial contribution in the conception, planning or execution of the crime, overcomes the constitutional and principled violations of the doctrine.<sup>21</sup> In other words, as the criticism levelled against the doctrine is primarily rooted in the imputation of causation, a theory that is based on an alternative approach to causation will be devoid of such criticism. However, Walker's reformist theory is assailable for a number of constitutional and principled reasons.<sup>22</sup>

First, Walker acknowledges that the doctrine, in its present form infringes the accused's presumption of innocence, as it relieves the prosecution of having to prove the element of causation in relation to a participant in a common purpose.<sup>23</sup> Walker's theory, which necessitates an association plus a substantial contribution, merely addresses her submission that the prosecution is relieved from proving the extent of the participant's contribution to the

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<sup>16</sup> Presence at the scene would not be required for participants described in (a) and (b), whilst presence would be necessary for participants encapsulated in (c). On the difficulty of proving the contribution of each participant, Walker recommends the development of rules of evidence to assist the court and the prosecution.

<sup>17</sup> Walker *op cit* (n1) at 152.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid* at 153: Alternative convictions including, but not limited to attempts, incitement, and public violence.

<sup>20</sup> *Ibid* at 152.

<sup>21</sup> *Ibid* at 155.

<sup>22</sup> Walker's findings, although based on different grounds, correlates with the findings of this dissertation. Walker concludes that the application of the doctrine amounts to an unreasonable and unjustifiable limitation of a participant's rights to dignity, freedom and security of person, and presumption of innocence. She submits that accomplice liability is an "equally practical, normatively defensible and less draconian measure available to achieve the same purpose" as the doctrine.

<sup>23</sup> *Ibid* at 119.

common purpose.<sup>24</sup> On her reformed theory of common purpose, the derogation of the causal nexus still exists, thus the prosecution remains relieved of having to prove a necessary element of a consequence crime and the participant continues to be deprived of viable defences that exclude causation.<sup>25</sup> The doctrine unfairly discriminates between a participant in a common purpose and both the principal perpetrator and a person charged of committing a consequence crime but not engaged in a common purpose,<sup>26</sup> Walker's theory disregards this significant claim of unfair discrimination. Additionally, even on Walker's theory, a participant's right to freedom and security of person is infringed, as the threshold test set in *De Lange v Smuts*<sup>27</sup> fails. The threshold test necessitates a proportionality assessment, similar to that which a court performs under a s 36 limitation analysis. Accordingly, the availability of less intrusive means, namely accomplice liability, indicates that the deprivation is not for a 'just cause'.<sup>28</sup>

On Walker's theory, the infringement of the aforementioned rights is sufficient to pass the threshold enquiry stage and necessitate a justification under s 36 of the Constitution.<sup>29</sup> A limitation analysis, adopting the Kantian approach to the interpretation of rights,<sup>30</sup> with an emphasis on the availability of less restrictive means, specifically liability as an accomplice, would certainly render the limitation unreasonable and unjustifiable.<sup>31</sup>

This paper has found that the concept of 'active association' is inherently vague, thus violating the *ius certum* principle.<sup>32</sup> Walker's theory seeks to base liability on association, which includes the requirements of prior agreement and active association, plus a substantial contribution. Walker's undefined concept of 'substantial contribution' is equally as vague as the concept of 'active association'. The vagueness of the concept of 'active association', plus the vagueness of the concept of 'substantial contribution' will increase the courts' freedom to interpret a case with hindsight directed at crime control.<sup>33</sup> Lastly, Walker has failed to consider the problems associated with the assessment of fault in common purpose cases.<sup>34</sup> Thus, even on her reformed theory, the doctrine revives the *versari in re illicita* doctrine and

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<sup>24</sup> Ibid.

<sup>25</sup> See the discussion on the violation of an accused's right to be presumed innocent in chapter 2.5.

<sup>26</sup> See the discussion on an accused's claim of unfair discrimination in chapter 2.7

<sup>27</sup> *De Lange v Smuts* 1998 (3) SA 785 (CC).

<sup>28</sup> See the discussion on the violation of an accused's right to freedom and security of person in chapter 2.6

<sup>29</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>30</sup> See the discussion on the Kantian interpretation of the limitation clause in chapter 2.8.3.

<sup>31</sup> See the assessment of the limitation clause in chapter 2.8.4.

<sup>32</sup> The vagueness of the concept of active association is discussed in chapter 3.2.2.

<sup>33</sup> See the arguments leveled against the crime control benefits of the doctrine in chapters 2.8.4.1 and 2.8.4.2.

<sup>34</sup> The problems associated with the assessment of fault in common purpose cases are discussed in chapter 3.4.

violates the contemporaneity rule.<sup>35</sup> Furthermore, the theory does not address the courts improper inferential reasoning in establishing *dolus eventualis* in common purpose cases.<sup>36</sup>

Walker's theory, although arguably addressing a participant's constitutional concerns related to dignity,<sup>37</sup> such as the principles of culpability, proportionality and fair labelling, fails to address a number of issues raised above. Her finding regarding the unconstitutionality of the present doctrine is correct, and a result of such finding, specifically the existence of less intrusive means, is perhaps the only reformist approach capable of addressing the constitutional and principled shortcomings of the present doctrine.

#### **4.2.3 Abolition and replacement**

Burchell calls for the eradication of the doctrine of common purpose, with the substitution of less intrusive means of punishing persons involved in joint criminal activity, such as convictions for lesser crimes and liability as an accomplice.<sup>38</sup> He criticises Moseneke J's reliance on the English joint enterprise rule as support for South Africa's doctrine of common purpose. His criticism is based on the fact that English law does not deem participants in a joint enterprise as co-perpetrators through the imputation of liability, but rather deems participants as accomplices. Burchell submits that replacing common purpose with accomplice liability would allow the court to give appropriate weight to the extent of a participant's participation in a common purpose in determining the verdict and sentence.<sup>39</sup>

Joubert JA in *Williams*<sup>40</sup> defined an accomplice as a person who, lacking the *actus reus* of the perpetrator and can thus not be regarded as a perpetrator or co-perpetrator:

[A]ssociates himself wittingly with the commission of the crime... in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which furthers the commission of the crime... The assistances consciously rendered by the accomplice in the commission of the crime can consist of an act or an omission... [T]here

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<sup>35</sup> See the discussion on the moment *mens rea* is assessed in common purpose cases in chapter 3.4.2.

<sup>36</sup> See the elucidation of the court's improper inferential reasoning in establishing *dolus eventualis* in common purpose cases in chapter 3.4.3.

<sup>37</sup> The right to dignity and the three corollary principles thereof (culpability, proportionality, and fair labelling) are discussed in chapter 2.4.

<sup>38</sup> J Burchell *Principles of Criminal Law* 5<sup>th</sup> Ed (2016) at 487.

<sup>39</sup> Ibid at 488.

<sup>40</sup> *Williams* 1980 (1) SA 60 (A) (translated in JM Burchell *Cases and Materials on Criminal Law* 3<sup>rd</sup> Ed (2007) at 528).



must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator.<sup>41</sup>

In *Khoza*,<sup>42</sup> Botha AJA's dissenting judgment affirmed the causal connection requirement for accomplice liability proffered by Joubert JA in *Williams*. However, neither Joubert JA nor Botha AJA articulated the degree of the causal connection required. Burchell submits that "only factual causation in the sense of 'furthering' or 'assisting' in the commission of the crime is necessary for accomplice liability", thereby confining an assessment of legal causation to perpetrator liability.<sup>43</sup> Burchell's approach to accomplice liability, specifically the assessment of causation, raises strong constitutional challenges.

First, an accomplice's right to be presumed innocent is infringed, as the prosecution is relieved of having to prove the necessary element of causation in consequence crimes, specifically the requisite legal causation element.<sup>44</sup> An accomplice's presumption of innocence is also infringed through the unavailable viable defences excluding causation.<sup>45</sup> Burchell's unfair discrimination criticism leveled against common purpose is equally applicable to accomplice liability, as an accomplice is treated unequally in contrast to a perpetrator or co-perpetrator.<sup>46</sup> It is thus evident that the recommendation provided by Burchell is also plagued by constitutional incongruence.

### 4.3 THE WRITER'S RECOMMENDATION

The findings of this thesis necessitate the abolition of the doctrine of common purpose by prior agreement and in its active association form. The recommendations captured by the three schools of thought fail to ensure that the doctrine complies with the Constitution and adheres to criminal law principles. Burchell's call for the abolition and replacement of the doctrine hints at the only viable recommendation. Convictions for lesser crimes<sup>47</sup> and liability as an accomplice is the correct approach. However, before the constitutional and principled

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<sup>41</sup> Ibid at 63A-C.

<sup>42</sup> *S v Khoza* 1982 (3) SA 1019 (A) at 1054G-H.

<sup>43</sup> Burchell op cit (n38) at 509.

<sup>44</sup> The content of the right to be presumed innocent, specifically the proof of a necessary element of consequence crimes is discussed in chapter 2.5.3.

<sup>45</sup> The content of the right to be presumed innocent, specifically an accused's failure to be afforded viable defences crimes is discussed in chapter 2.5.4.

<sup>46</sup> The claim for unfair discrimination is assessed in chapter 2.7.

<sup>47</sup> Lesser crimes include, but are not limited to: incitement; conspiracy; attempts; malicious damage to property; public violence.

criticism leveled against the doctrine of common purpose is not equally applicable to accomplice liability; two developments are required. The first development pertains to the law related to accomplice liability, and the second pertains to a policy consideration.

Accomplice liability requires a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator. This causal connection should entail an assessment of both factual and legal causation. Such an approach would address the abovementioned constitutional challenge leveled against Burchell's theory of accomplice liability. The second development necessitates a discussion of the punishment of accomplices.

The principle of proportionality reflects the relationship between the severity of the crime and the sentence imposed.<sup>48</sup> In determining the seriousness of the crime, a number of aggravating and mitigating factors are assessed. One relevant factor is the culpability of the offender.<sup>49</sup> Burchell submits that "the appropriate sentence to impose on an accomplice will depend on the extent of the accomplice's participation in the crime".<sup>50</sup> However, Terblanche argues that the exact weight attached to the mitigating factor of an accused's degree of involvement in the commission of the crime, in contrast to other mitigating and aggravating factors remains unknown.<sup>51</sup> The South African Law Commission Report has proposed a principled approach to determining the seriousness of a crime, which prioritises the principle of proportionality:<sup>52</sup>

It is desirable that punishment in the first instance must be proportionate to the seriousness of the offence so that offenders can get their just deserts. The seriousness of the offence depends in turn on the harm caused by the offence and the culpability of the offender in respect of the offence. A focus on harm and culpability will enable a court to impose adequately severe sentences.<sup>53</sup>

The Report seeks to position the offence as the main focus of the sentencing decision, as opposed to society's interests of punishment.<sup>54</sup> However, the proposal has not yet been

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<sup>48</sup> SS Terblanche *A Guide to Sentencing in South Africa* 3<sup>rd</sup> Ed (2016) at 163.

<sup>49</sup> *S v Ndima* 1994 (2) SACR 525 (D) at 536i; *S v Davids* 1995 (1) SACR 365 (A) at 366d; *S v Andhee* 1996 (1) SACR 419 (A) at 424e-f; *S v Di Blasi* 1996 (1) SACR 1 (A) at 9d; *S v Deetlefs* 1996 (1) SACR 654 (A) at 63c-d; *S v Qamata* 1997 (1) SACR 479 (E) at 483a.

<sup>50</sup> Burchell op cit (n38) at 512.

<sup>51</sup> Terblanche op cit (n48) at 209.

<sup>52</sup> South African Law Commission Report (Project 82) *Sentencing (A New Sentencing Framework)* (2000).

<sup>53</sup> Ibid para 3.1.4.

<sup>54</sup> Terblanche op cit (n48) at 163.

accepted. Only on the acceptance of the proposal can an accomplice's right to dignity be respected, as the principles of culpability, proportionality and fair labeling are satisfied.

It is submitted that the doctrine of common purpose must be abolished from South African law, and replaced with convictions for lesser crimes and liability as an accomplice. The causal connection required under accomplice liability must comprise of both factual and legal causation. Furthermore, the sentencing report must be accepted, so as to adequately reflect the extent of an accomplice's participation in determining the sentence. This overall approach would bring South Africa's law related to participation in a crime in line with English<sup>55</sup> and German law.<sup>56</sup>

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<sup>55</sup> For a discussion on the law related to criminal complicity in England, see: *R v Powell*; *R v English* [1997] 4 All ER 545; *R v Rahman* [2008] UKHL 45; *R v Gnango* [2012] 1 AC 827 (SC); GR Sullivan 'Doing without Complicity' (2012) *JCCL* 199 at 206; A Ashworth & J Horder *Principles of Criminal law* 7<sup>th</sup> Ed (2013) at 416-53.

<sup>56</sup> For a discussion on the law related to criminal complicity in Germany, see: MD Dubber 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *Journal of International Criminal Justice* 977.

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